Supreme Court, U.S.
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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TANA WOOD,

Petitioner,

v.

PATRICK JAMES JEFFRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Does juror exposure to extrinsic information of a defendant's prior criminal history presumptively deprive the defendant of a fair trial?

2. Does the *Brecht v. Abrahamson*, 507 U.S. 619 (1993) "actual prejudice" standard for harmless error review of trial errors allow a federal habeas court to presume prejudice?

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 1

III. CONSTITUTIONAL AND STATUTORY . . 1

IV. STATEMENT OF THE CASE 2

A. State Trial and Direct Appeal 2

B. State Collateral Review 4

C. Federal Habeas Corpus Proceedings . . . 6

1. *Jeffries I, II,* and *III* 6

2. *Jeffries IV* and *V* 8

V. REASONS FOR GRANTING THE WRIT . . 11

A. The Legal Standard for Adjudicating Juror Misconduct Claims is an Important Constitutional Question 11

B. The Ninth Circuit's "Intrinsic Prejudice" Standard is Incompatible with the *Brecht* Harmless Error Standard of Actual Prejudice. 15

VI. CONCLUSION 21

TABLE OF AUTHORITIES

Cases	Page
Bibbins v. Dalsheim, 21 F.3d 13 (2d Cir.) *cert. denied*, 115 S. Ct. 261 (1994)	12
Brecht v. Abrahamson, 507 U.S. 619 (1993)	8-11, 15-17, 20
California v. Roy, ___ U.S. ___, 117 S. Ct. 337 (1996)	11, 15, 20
Carpenter v. Gomez, ___ U.S. ___, 116 S. Ct. 488 (1995)	11, 12, 14
Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988)	7, 9
Francis v. Franklin, 471 U.S. 307 (1985)	20
Gonzales v. Beto, 405 U.S. 1052 (1972)	14
Greer v. Miller, 483 U.S. 756 (1987)	19
In re Jeffries, 110 Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988)	6

In re Jeffries,
114 Wn.2d 485, 789 P.2d 731 (1990) 6

Irvin v. Dowd,
366 U.S. 717 (1961) 16

Jeffries v. Blodgett,
5 F.3d 1180 (9th Cir. 1993) 8-11, 14

Jeffries v. Blodgett,
771 F. Supp. 1520 (W.D. Wash. 1991) 6

Jeffries v. Blodgett,
974 F.2d 1179 (9th Cir. 1992) 7, 9, 11

Jeffries v. Blodgett,
988 F.2d 923 (9th Cir. 1993) 7-9

Jeffries v. Wood,
75 F.3d 491 (9th Cir. 1996) 1, 9, 11, 13, 14

Jeffries v. Wood,
114 F.3d 1484 (9th Cir. 1997) 1, 8-11, 13-17, 20

Lindh v. Murphy,
___ U.S. ___, 117 S. Ct. 2059 (1997) 10

Marshall v. Lonberger,
459 U.S. 422 (1983) 19

Mu'min v. Virginia,
500 U.S. 415 (1991) 16

Murphy v. Florida,
421 U.S. 794 (1975) 16

O'Neal v. McAninch,
513 U.S. 432 (1995) 9, 16

Parker v. Gladden,
385 U.S. 363 (1966) 13, 17

Parker v. Randolph,
442 U.S. 62 (1979) 19

Remmer v. United States,
347 U.S. 227 (1954) 14, 17

Richardson v. Marsh,
481 U.S. 200 (1987) 19

Roy v. Gomez,
81 F.3d 863 (9th Cir. 1996) 15

Smith v. Phillips,
455 U.S. 209 (1982) 13, 14, 17

State v. Jeffries,
105 Wn.2d 398, 717 P.2d 722,
cert. denied, 479 U.S. 922 (1986) 2, 4

State v. Jeffries,
722 P.2d 99 (1986) 6

Tennessee v. Street,
471 U.S. 409 (1985) 19

Turner v. Louisiana,
379 US. 466 (1965) 13, 17

United States ex rel. Owen v. McMann,
435 F.2d 813 (2d Cir. 1970),
cert. denied, 402 U.S. 906 (1971) 13

United States v. Aguirre,
108 F.3d 1284 (10th Cir. 1997) 12

United States v. Bertoli,
40 F.3d 1384 (3d Cir. 1994) 13

United States v. Boylan,
898 F.2d 230 (1st Cir.),
cert. denied, 498 U.S. 849 (1990) 12, 14

United States v. Branham,
97 F.3d 835 (6th Cir. 1996) 12

United States v. Console,
13 F.3d 641 (3d Cir. 1993) 12

United States v. Howard,
506 F.2d 865 (5th Cir. 1975) 13

United States v. Jobe,
101 F.3d 1046 (5th Cir. 1996) 12

United States v. Olano,
507 U.S. 725 (1993) 13

United States v. Perkins,
748 F.2d 1519 (11th Cir. 1984) 13

United States v. Rowley,
975 F.2d 1357 (8th Cir. 1992) 12

United States v. Swinton,
75 F.3d 374 (8th Cir. 1996) 13

United States v. Walker,
1 F.3d 423 (6th Cir. 1993) 14

United States v. Williams-Davis,
90 F.3d 490 (D.C. Cir. 1996) 12, 14

Wainwright v. Witt,
469 U.S. 412 (1985) 17

Wood v. Jeffries,
510 U.S. 1191 (1994) 8

Statutes & Regulations

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(a) 1

Other Authorities

Title I of the Antiterrorism and
Effective Death Penalty Act of 1996,
Pub. L. No. 104-132, 110 Stat. 1214 10

Washington Rules of Appellate
Procedure 16.3-16.15 5

U.S. Const. amend. VI 1

U.S. Const. amend. XIV 1

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The decision of the district court is unpublished and appears at Appendix C. The opinion of the three-judge panel of the Court of Appeals, Appendix B, is reported at *Jeffries v. Wood*, 75 F.3d 491 (9th Cir. 1996). The opinion of the Court of Appeals on rehearing *en banc* appears at Appendix A and is reported at *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (*en banc*).

II. JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

IV. STATEMENT OF THE CASE

A. State Trial and Direct Appeal

On April 2, 1983, the bodies of Phillip and Inez Skiff were found in shallow graves on the Skiffs' property in rural Clallam County, Washington. At the time of the murders in March of 1983, Patrick James Jeffries was on parole from one of his many Canadian convictions and was a houseguest of the Skiffs. He killed Phillip Skiff by firing seven .22 caliber bullets into his body and killed Inez Skiff with ten bullets. Jeffries departed for Canada in the Skiffs' pickup truck with several items of the Skiffs' personal property, including currency, gold, weapons, and household belongings. He was eventually apprehended in Wenatchee, Washington, after he returned from Canada.[1]

In April 1983, Jeffries was charged with two counts of Aggravated First Degree Murder in Clallam County Superior Court. The case received extensive news coverage by the local media, and most of the pretrial publicity included details about Jeffries' lengthy Canadian criminal record or his status as a parolee. The trial court

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[1]The Washington Supreme Court's decision in Jeffries' direct appeal contains a detailed discussion of the facts surrounding the murders. *See State v. Jeffries*, 105 Wn.2d 398, 401-06, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

denied Jeffries' motion for change of venue based upon the pretrial publicity. 1 REC. 175-79.[2]

Jury selection took place between October 4 and 18, 1983. During the course of voir dire, several of the jurors who were selected indicated that they had been exposed to pretrial publicity about the case, most of which included details of Jeffries' Canadian criminal history and parole status. Nevertheless, Jeffries did not exercise any challenges for cause against the jurors who served in his case on the basis of their familiarity with his background.[3] Indeed, Jeffries waived six of his twelve available peremptory challenges to the regular jurors and two of his four peremptory challenges to the alternate jurors. 6 REC. 1735; 7 REC. 2086.

The evidence of Jeffries' Canadian convictions was not admitted at trial, not because of any perceived danger of unfair prejudice to the defense but rather because the prosecutor's offer of proof was deemed insufficient. During the guilt phase of trial, the trial court granted a preliminary motion in limine in favor of the defense but indicated that the issue of the convictions' admissibility could be reopened upon a more complete proffer by the prosecution. See 7 REC. 2113 ("At this point I think that I will grant the motion in limine. It may be reviewed at a later time after I deal with these matters of the hearsay and

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[2]The citations to "REC." refer to the 22 volumes of the complete state court record filed with the district court.

[3]Jeffries exercised a challenge for cause of one of the twelve regular jurors who ultimately served on his jury. However, that juror had had *no* exposure to the news accounts of Jeffries' criminal background, and the juror was challenged for cause on the basis of his responses to a completely different line of questions. 5 REC. 1347, 1352. The trial court denied the challenge for cause. 5 REC. 1352. Although Jeffries could have exercised a peremptory challenge, he waived any further challenge to the juror. 7 REC. 1735.

the other evidence, whatever it might be that may tend to establish this motive. Until that is done, the motion in limine is granted . . . ."). The prosecutor did not subsequently offer the convictions during the guilt phase, so no definitive ruling was made. At the beginning of the penalty phase, the prosecutor offered Jeffries' record of criminal convictions. 11 REC. 3561-62. The trial court ruled the convictions inadmissible because the prosecutor had not established to the court's satisfaction that the convictions were counseled and met the requirements of Canadian law. See 11 REC. 3568 ("[T]he State has the burden of making a prima facie [sic] that these are legitimate, admissible convictions and that includes that they were counseled . . . . They have not been proven. Unless the State can show me more, I think that the convictions that I have previously seen copies of are not admissible and they will not be admitted"). Thus, no evidence of Jeffries' criminal history was presented in either the guilt or the penalty phase of trial.

Jeffries' trial and special sentencing hearing took place between October 19 and November 7, 1983. The jury found him guilty of both counts of aggravated first degree murder. 15 REC. 4806, 4808, 4810-11. The same jury subsequently determined that there were not sufficient mitigating circumstances to warrant leniency, and Jeffries was sentenced to death. 15 REC. 4830, 4920-22. His conviction and death sentence were affirmed on direct appeal. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

B. State Collateral Review

Approximately two years after his trial and while his case was pending on direct appeal, Jeffries filed a personal restraint petition[4] in the Washington Supreme Court alleging juror misconduct. 19 REC. 5794-5803. In support of his petition, Jeffries filed the affidavits of two of his jurors who alleged that a third juror, sometime during a break in the trial, made a passing reference to the fact that Jeffries was a "convicted armed robber" or had a "record". 19 REC. 5804-05.[5] In response to Jeffries' petition, the prosecutor filed the affidavits of eight other jurors, all of whom denied hearing any such comments by any juror. 19 REC. 5825-32, 5835-37, 5862-63.

The Washington Supreme Court denied Jeffries' personal restraint petition, explaining that:

> Mr. Jeffries has not alleged facts which, even if true, show that he was denied a fair trial. The alleged misconduct occurred in the early stages in trial, weeks before any deliberations were commenced. Over two and a half years passed between the trial and the time the alleged misconduct was discovered, indicating that the jurors

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[4]A personal restraint petition is a post-conviction collateral relief action in the Washington appellate courts. *See* Washington Rules of Appellate Procedure (RAP) 16.3-16.15.

[5]The two jurors who alleged that they heard the remarks, Kathleen Sims and Thomas Tyszko, had both been exposed to pretrial news accounts about Jeffries and the crimes. *See* 6 REC. 1591-1609 (voir dire of Sims); 6 REC. 1716-35 (voir dire of Tyszko). Sims was specifically questioned in some detail about her knowledge of Jeffries' criminal record. 6 REC. 1600-04. However, neither juror was challenged for cause despite their familiarity with Jeffries' background.

> involved did not believe the misconduct to be significant. In sum, the record unequivocally shows that Mr. Jeffries murdered Phil and Inez Skiff. With such overwhelming evidence, we cannot accept petitioner's argument that he was denied a fair trial because of this alleged juror misconduct.

19 REC. 5866, 5867-68; *State v. Jeffries*, 722 P.2d 99 (1986). The Washington Supreme Court also denied Jeffries' two subsequent personal restraint petitions. *In re Jeffries*, 110 Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988); *In re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990).

C. Federal Habeas Corpus Proceedings

1. *Jeffries I, II,* and *III*

In July 1990, Jeffries filed a petition for writ of habeas corpus with the district court. The petition raised a total of eighteen claims, including Jeffries' claims regarding the trial court's denial of his motion for a change of venue and the jury misconduct allegations. The district court conducted an evidentiary hearing on the jury misconduct claim and an independent review of the state court record, and denied Jeffries' petition. Regarding the venue claim, the district court held that Jeffries' right to a fair and impartial jury was not violated by the pretrial publicity in his case. *Jeffries v. Blodgett,* 771 F. Supp. 1520, 1537 (W.D. Wash. 1991). With regard to Jeffries' jury misconduct claim, the district court found it unnecessary even to determine whether the misconduct occurred at all, concluding that there was "no reasonable possibility that the introduction of extrinsic evidence

affected the jury verdict in this action." *Id.* 771 F. Supp. at 1539.

On appeal, the three-judge panel of the Ninth Circuit initially agreed with the district court's disposition of Jeffries' impartial jury claims. The court agreed that Jeffries had failed to demonstrate actual prejudice due to pretrial publicity. *Jeffries v. Blodgett*, 974 F.2d 1179, 1187-88 (9th Cir. 1992) ("*Jeffries I*"). The court also affirmed the district court's resolution of the juror misconduct claim, holding that "[r]esidual memory of pretrial information is generally dealt with in voir dire, and jurors are entitled to be believed when they say that such information will not affect their ability to decide the case on the evidence presented in court." *Jeffries*, 974 F.2d at 1188.

On March 3, 1993, however, the same Ninth Circuit panel reversed itself and issued an amended 2-1 opinion in which it ruled that Jeffries' jury misconduct claim, if the alleged "record" remark occurred, would require that the writ of habeas corpus be granted. *Jeffries v. Blodgett*, 988 F.2d 923, 933 (9th Cir. 1993) ("*Jeffries II*"). Citing *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), the majority concluded that, if Jeffries' allegations of jury misconduct were true, the writ must be granted. 988 F.2d at 933.[6] The court remanded the case to the district court for a determination of whether the jury misconduct had in fact occurred. *Id.* However, and

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[6]In *Dickson*, a deputy sheriff who was responsible for escorting jurors to and from the courtroom told two jurors that Dickson, who was on trial for bludgeoning a man to death with a pool cue, had "done something like this before." *Dickson*, 849 F.2d at 405. The Ninth Circuit held that the deputy's comment could "only be understood as referring to a previous act of brutality or murder," and that there was thus a reasonable possibility of prejudice requiring that the writ of habeas corpus be granted. *Id.* at 408.

somewhat inconsistently, the court also concluded that Jeffries had failed to demonstrate actual prejudice from the pretrial publicity in his case. *Id.* at 932-33. Dissenting, Judge Fernandez criticized the majority for "elevating the mere receipt of prior offense information to what amounts to a per se rule that requires the overturning of a jury verdict." *Id.* at 929.

The State sought rehearing *en banc* and cited this Court's then-recent decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), arguing that the jury misconduct in Jeffries' case, if it occurred at all, was harmless. The divided panel of the Ninth Circuit, while acknowledging the new standard for harmless error in *Brecht*, denied the State's petition, holding in a second amended opinion that "extrajudicial knowledge of Jeffries' prior conviction for armed robbery [was] especially harmful" and could not have been harmless. *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) ("*Jeffries III*"). Judge Fernandez again dissented, criticizing the per se nature of the majority's ruling and observing that "[i]f certain comments were merely made by a juror, an almost 10 year old conviction for two vicious murders will be set aside. That, to my mind, is a travesty." *Id.* at 1199. This Court denied the State's petition for writ of certiorari, *Wood v. Jeffries*, 510 U.S. 1191 (1994), and the case was remanded to the district court for further proceedings.

2. *Jeffries IV* and *V*

On remand, the district court on February 17, 1995, granted the writ of habeas corpus and set aside Jeffries' aggravated murder conviction and death sentence. App. C. The district court ruled that the juror misconduct had in fact occurred, finding that a juror had stated something "to the effect that Jeffries either had a record or had been convicted of robbery." App. C-2. However, the court

made the following additional observation:

> This Court remains convinced that there was no prejudicial error from statements by a juror as to Jeffries' past record or past conviction for armed robbery. However, this Court's review is tightly circumscribed by the Court of Appeals. . . . Therefore, pursuant to the Court of Appeals' reasoning, a writ of habeas corpus should issue.

App. C-2.

The State appealed and the case was again heard by the same three-judge panel that had previously ruled in *Jeffries I, II,* and *III*. This time, however, the panel unanimously reversed itself, candidly acknowledging that "[t]he doctrine of the law of the case does not relieve us of the duty to correct our own manifest error in telling the district court that *Dickson v. Sullivan* required 'the same result' in this case. Our prior decision was 'clearly erroneous and would work a manifest injustice.'" *Jeffries v. Wood*, 75 F.3d 491, 494 (9th Cir. 1996) ("*Jeffries IV*"); App. B-6. The panel concluded that it had, in *Jeffries II* and *III*, read the case of *Dickson v. Sullivan* too broadly and "failed to discern the significant difference between external contamination of a jury by officers of the court (*Dickson*) and internal misconduct by a fellow juror, who remembered from the past facts that had not been part of the evidence, and mentioned them to the other jurors. That was our mistake, and we admit it." *Jeffries IV*, 75 F.3d at 494; App. B-6. Upon reexamination of the state and federal record in light of this Court's decisions in *Brecht v. Abrahamson*, *supra*, and *O'Neal v. McAninch*, 513 U.S. 432 (1995), the panel found the jury misconduct in Jeffries' case to be harmless error. *Jeffries IV*, *supra*; App. B-7.

The Court of Appeals granted Jeffries' petition for

rehearing *en banc* and, in a 6 to 5 decision, reversed the *Jeffries IV* panel opinion. *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (*en banc*) ("*Jeffries V*"). The *en banc* majority ruled that the panel had erred in its application of the law of the case doctrine and should not have revisited its holding in *Jeffries III*. *Jeffries V*, 114 F.3d at 1492-93; App. A-13-15. "We agree with *Jeffries III* that the communication by its nature was intrinsically prejudicial and necessarily had a substantial and injurious influence on the verdict." 114 F.3d at 1491; App. A-11. The *en banc* majority also held that the *source* of the jury's extrinsic information was irrelevant. *Id.* at 1490; App. A-9. However, the majority held that the jury misconduct affected only the jury's aggravated circumstances findings and the death sentence. Therefore, the majority reversed the district court's decision insofar as it set aside Jeffries' first degree murder conviction. 114 F.3d at 1493, 1501; App. A-17.[7]

Judge Kozinski, in a strongly-worded dissent joined by four other judges, accused the majority of an "end-run around *Brecht v. Abrahamson*" by "giving birth to a mutant breed of trial errors that are 'inherently prejudicial' and thus indistinguishable from structural errors." *Jeffries V*, 114 F.3d at 1507 (Kozinski, J., dissenting); App. A-50.

> If the vague comments referring to Jeffries's prior conviction made in the juryroom were harmful in this case, there is *no* case where

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[7]The *en banc* court also ruled on the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and held that the Act did not apply to Jeffries' case because his petition was filed well before the Act's effective date. *Jeffries V*, 114 F.3d at 1493-1502; App. A-17-35. In light of this Court's recent decision in *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997), that part of *Jeffries V* is no longer at issue.

> such an error could be harmless. The majority thus has created what in practice is a per se rule of reversal for cases where information adverse to the defendant is uttered by or to one of the jurors outside the courtroom.

Id. (emphasis in original). Judge Kozinski warned that the majority's "failure to faithfully apply the *Brecht* standard will likely force the Supreme Court to send us another wake-up call." *Id.* (citing *California v. Roy*, ___ U.S. ___, 117 S. Ct. 337 (1996)).

V. REASONS FOR GRANTING THE WRIT

A. The Legal Standard for Adjudicating Juror Misconduct Claims is an Important Constitutional Question

This Court recently denied certiorari in a case that raised the still-unresolved question of "what standard should be applied in determining whether juror misconduct involving highly prejudicial information requires reversal of a capital conviction and sentence." *Carpenter v. Gomez*, ___ U.S. ___, ___, 116 S. Ct. 488, 489 (1995) (Stevens, J., respecting the denial of certiorari) (juror received information that defendant was already under a sentence of death for other crimes). Because of that void, the jury misconduct in Jeffries' case has been found to be harmless beyond a reasonable doubt (*Jeffries I*), harmless under the *Brecht* standard (*Jeffries IV*), and harmful under *Brecht* (*Jeffires III* and *V*). Of the 14 federal judges to have reviewed Jeffries' jury misconduct claim, eight of them ultimately concluded that the error was harmless while six concluded that the same error could not be.

The tortured procedural history of Jeffries' jury misconduct claim demonstrates the need for a clearer set of guidelines from this Court regarding the legal standard to apply to cases where jurors are exposed to extraneous prejudicial information about the defendant. This Court should grant certiorari and use Jeffries' case to clarify this "novel and important constitutional standard." *Carpenter v. Gomez*, 116 S. Ct. at 489 (Stevens, J., respecting the denial of certiorari).

The circuit courts are not uniform in their handling of jury misconduct claims involving extrinsic information. For example, the Fifth, Eighth, and Tenth Circuits have held that when extrinsic information reaches the jury, there is a presumption of prejudice and the government bears the burden of demonstrating harmlessness. *United States v. Jobe*, 101 F.3d 1046, 1058 (5th Cir. 1996); *United States v. Rowley*, 975 F.2d 1357, 1363 (8th Cir. 1992); *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997). The circuit courts for the District of Columbia and the First and Third Circuits have held that a presumption of prejudice may be applied only in cases involving egregious tampering or third party communications with the jury; mere exposure to extrinsic information does not raise a presumption of prejudice. *United States v. Williams-Davis*, 90 F.3d 490, 501-03 (D.C. Cir. 1996); *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990); *United States v. Console*, 13 F.3d 641, 666-67 (3d Cir. 1993). The Sixth Circuit has held that "under no circumstance will prejudice be presumed." *United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1996). The Second Circuit takes the approach that a presumption of prejudice applies to direct review of federal convictions where the jury is exposed to extra-record information, but no such presumption applies to habeas corpus review of state court convictions. *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir.) *cert. denied*, 115 S.

Ct. 261 (1994).

The Third Circuit distinguishes between intra-jury influences and extra-jury influences, observing that extra-jury influences are far more serious and may in some cases give rise to a presumption of prejudice but intra-jury contacts do not create such a presumption of prejudice. *United States v. Bertoli*, 40 F.3d 1384, 1394-95 (3d Cir. 1994) ("intra-jury communications pose a less serious threat to a defendant's right to an impartial trial than do extra-jury influences"); *see also Jeffries IV*, 75 F.3d at 494. Other courts, however, have rejected any such internal/external dichotomy and analyze jury misconduct claims without regard for the source of the extraneous information. *United States v. Swinton*, 75 F.3d 374, 381 (8th Cir. 1996); *United States v. Perkins*, 748 F.2d 1519, 1533-34 (11th Cir. 1984); *United States v. Howard*, 506 F.2d 865, 867-68 (5th Cir. 1975); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 816-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *see also Jeffries V*, 114 F.3d at 1490 & n.4.

The stability of jury verdicts and the finality of criminal convictions deserve a greater degree of uniformity among the circuits as to the legal standard for review of post-trial claims of jury misconduct. While this Court suggested in *United States v. Olano*, 507 U.S. 725 (1993) that certain "intrusions" into the jury's deliberative process may give rise to a presumption of prejudice in certain cases, *id.* at 738-39, the Court did not clearly define what constitutes such an intrusion, nor did the Court give any content to the presumption.[8] Although the Court has in

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[8]The Court in *Olano*, after recognizing that certain intrusions may be presumptively prejudicial, stated "but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: 'Did the intrusion affect the jury's deliberations and thereby its verdict?'" *Olano*, 507 U.S. at 739.

cases such as *Parker v. Gladden*, 385 U.S. 363 (1966) and *Turner v. Louisiana*, 379 US. 466 (1965), involving jury contamination by officers of the court, applied a presumption of prejudice, the Court has subsequently held that a defendant alleging juror misconduct must prove actual bias. *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (citing *Remmer v. United States*, 347 U.S. 227, 229-30 (1954).[9]

This Court's jury misconduct/contamination decisions and "intrusion jurisprudence" are sufficiently amorphous to allow the Ninth Circuit to hold that the extraneous information to which the two jurors in Jeffries' case were exposed was either presumptively prejudicial, *see Jeffries III*, 5 F.3d at 1191, not prejudicial at all, *Jeffries IV*, 75 F.3d at 494, or "intrinsically prejudicial and necessarily [having] a substantial and injurious influence on the verdict." *Jeffries V*, 114 F.3d at 1491. The Court should grant certiorari to determine under what circumstances, if any, a presumption of prejudice should be applied to such claims and whether the source of the extraneous information, intra- or extra-jury, is of legal significance. Jeffries' case is an appropriate vehicle for clarifying this "novel and important constitutional standard." *Carpenter v. Gomez*, *supra*.

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[9]The Sixth Circuit has held that this Court's opinion in *Smith v. Phillips* reinterpreted *Remmer* so as to shift the burden of proving prejudice to the defendant. *United States v. Walker*, 1 F.3d 423, 431 (6th Cir. 1993). Other circuits have held that *Phillips* merely abandoned the *Remmer* presumption in certain circumstances. *See, e.g., United States v. Boylan*, 898 F.2d 230, 261 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990); *United States v. Williams-Davis*, 90 F.3d 490, 495-96 (D.C. Cir. 1996). *See also Gonzales v. Beto*, 405 U.S. 1052, 1054-55 (1972) (mem.) (Stewart, J., concurring in judgment) (*Turner* did not create a "rigid, *per se* rule" of reversal but was merely a "recognition of the great prejudice inherent in the dual role of jury bailiff and key prosecution witness").

B. The Ninth Circuit's "Intrinsic Prejudice" Standard is Incompatible with the *Brecht* Harmless Error Standard of Actual Prejudice.

In Jeffries' case, the Ninth Circuit majority concluded that the extrinsic information imparted to the jurors could not be harmless under the actual prejudice standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Jeffries V*, 114 F.3d at 1491-92. "The only way the majority can find this error harmful is to disregard *Brecht* by holding that a finding of actual prejudice isn't necessary: '[T]he communication by its nature was *intrinsically prejudicial* and necessarily had a substantial and injurious influence on the verdict.'" *Jeffries V*, 114 F.3d at 1509 (Kozinski, J., dissenting) (quoting *Jeffries V*, 114 F.3d at 1491). The majority's standard for "intrinsic" or "inherent" prejudice runs afoul of *Brecht*'s case-by-case approach for analyzing trial errors in federal habeas corpus proceedings. This Court recently was required to correct the Ninth Circuit's modification and misapplication of *Brecht* in the context of jury instructions. *California v. Roy*, ___ U.S. ___, ___, 117 S. Ct. 337, 339 (1996) (per curiam), *rev'g Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (*en banc*). The Ninth Circuit's continuing mishandling of the *Brecht* standard, this time in the context of jury misconduct claims, requires this Court to issue yet another "wake-up call." *Jeffries V*, 114 F.3d at 1507 (Kozinski, J., dissenting).

The federal courts' harmless error review of trial errors necessarily requires a case-by-case approach. A constitutional error does not entitle a habeas corpus petitioner to relief from his conviction or sentence unless the error had "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*,

507 U.S. 619, 623 (1993), or unless the record is so evenly balanced that the reviewing judge is in "grave doubt" as to the error's harmlessness. *O'Neal v. McAninch*, 513 U.S. ___, ___, 115 S. Ct. 992, 995 (1995). Nothing in *Brecht* or *O'Neal* allows habeas courts to grant relief for trial errors that are "inherently prejudicial" or "intrinsically prejudicial", *Jeffries V*, 114 F.3d at 1491, a "mutant breed" of trial errors that are "indistinguishable from structural errors." *Id.* at 1507 (Kozinski, J., dissenting). The very nature of the *Brecht* inquiry disallows the use of such categorical presumptions of prejudice or per se rules.

There is no presumption of prejudice resulting from mere juror knowledge of a defendant's criminal background.

> [J]uror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] presumptively deprive [ ] the defendant of due process. . . . We must distinguish between mere familiarity with [the defendant] or his past and an actual predisposition against him. . . . To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

Murphy v. Florida, 421 U.S. 794, 799, 800 n.4 (1975). A jury need not be totally ignorant of the facts and issues involved in a case in order to be considered impartial. *Mu'min v. Virginia*, 500 U.S. 415, 430 (1991); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The burden is on the defendant to establish that he was denied his right to an

impartial jury, whether his challenge arises during trial or in the post-conviction setting. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985) ("it is the adversary seeking exclusion [of a juror] who must demonstrate, through questioning, that the potential juror lacks impartiality"); *Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of impartiality is a hearing in which the defendant has the opportunity to prove actual bias"). "Due process does not require a new trial every time a juror has been placed in a compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. at 217.

This Court has in some prior habeas cases applied a presumptive prejudice standard in cases involving jury contamination by outsiders. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff assigned to shepherd sequestered jury said "Oh that wicked fellow, he is guilty" and "If there is anything wrong [in finding him guilty], the Supreme Court will correct it"); *Turner v. Louisiana*, 379 U.S. 466 (1965) (two principal state's witnesses were deputy sheriffs who were responsible for taking care of sequestered jury, escorting them to and from court, eating and conversing with them, and performing errands for them); *see also Remmer v. United States*, 347 U.S. 227 (1954) (FBI agent investigating a bribe offer to a juror met privately with the juror during the course of trial). The Court has not, however, applied such a presumption of prejudice to cases of juror exposure to extraneous information, nor has the Court applied any such presumption to habeas corpus cases in the post-*Brecht* era.

The *Jeffries V* majority clearly applied a presumption of prejudice standard, whether "inherent" or "intrinsic", rather than the *Brecht* actual prejudice standard.

It is only by applying the presumptive prejudice standard that the court could grant relief, because a review of the record in Jeffries' case demonstrates that the extrinsic information was clearly harmless. The extrinsic information--a juror stated something "to the effect that Jeffries either had a record or had been convicted of robbery" (*see* App. C-2)--was vague and related to a conviction for a very different type of crime than that charged. It was a one-time reference that occurred during a trial recess, not during the jury's deliberations. Even the jurors who reportedly heard the remark insisted that it was not a topic for discussion during any of the deliberations. Indeed, the jurors themselves took steps to ensure that Jeffries' prior record not be considered.[10]

Moreover, the "record" remark was heard by only two other jurors, Mr. Tyszko and Ms. Sims. Both of those jurors had been exposed (as had nearly all of the jurors) to various media accounts of the Skiffs' murders, yet the defense did not challenge their qualifications to serve as impartial jurors despite their familiarity with extrajudicial information.[11] 6 REC. 1591-1609 (*voir dire* of Ms.

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[10]*See, e.g.*, 19 REC. 5854 (Affidavit of Kathleen Sims) ("One of the jurors asked 'Didn't Jeffries have a record?' I remember saying, 'I think so, but that has no bearing on this case.' There was general agreement. The discussion went no further at that time").

[11]Much of the news coverage of the Skiffs' murders (12 REC. 3770-3947) referred to Jeffries as a "Canadian parolee" or "ex-convict" who had served a prison sentence for armed robbery. *See*, e.g. 12 REC. 3771, 3773. Despite the level of news coverage of the case, Jeffries did not exercise any challenges against the jurors who ultimately served in his case on the basis of their familiarity with the media accounts and Jeffries' background. Jeffries did exercise a challenge for cause against one of the jurors who served on his jury but on the basis of that juror's responses to a completely different line of

Sims); 6 REC. 1716-35 (*voir dire* of Mr. Tyszko). Ms. Sims specifically stated during her *voir dire* examination that she was aware that Jeffries had a criminal record. 6 REC. 1600-04. Both jurors swore that they could set aside any pretrial information about Jeffries and decide the case solely upon the evidence presented in court. The trial court instructed the jury at the beginning of the jury selection process, at the beginning of trial, and at the conclusion of the guilt and penalty phases of trial that the jury could consider only the evidence admitted at trial, and that any evidence either not admitted or stricken by the court should be disregarded. 3 REC. 727; 7 REC. 2125; 15 REC. 4788 (guilt phase Instruction 1); 15 REC. 4822 (penalty phase Instruction 1). Jurors are presumed to follow the trial court's instructions. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).[12]

> The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's

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questions. 5 REC. 1347, 1352. Jeffries waived six of his twelve available peremptory challenges to the alternate jurors. 6 REC. 1735; 7 REC. 2086.

[12] *See also Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Tennessee v. Street*, 471 U.S. 409, 415 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion).

> constitutional rights. . . . Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.

Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) (citations omitted).

Only by employing a presumption of prejudice could the six-judge majority in *Jeffries V* determine that the "record" comment in Jeffries' case was "intrinsically prejudicial and necessarily had a substantial and injurious influence on the verdict." 114 F.3d at 1491. *Brecht* should not allow the use of such presumptions, however, just as it does not allow courts to modify *Brecht*. *See California v. Roy*, 117 S. Ct. at 339. Petitioner respectfully requests that this Court grant review and determine whether and to what extent a federal habeas corpus court may employ a presumption of prejudice in reviewing for harmless error.

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VI. CONCLUSION

Petitioner respectfully requests that the Court grant the writ of certiorari.

RESPECTFULLY SUBMITTED

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-99003
D.C. No. CV-90-00925-CRD

OPINION

PATRICK JAMES JEFFRIES,

Petitioner-Appellee,

v.

TANA WOOD, Superintendent,

Respondent-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted June 20, 1996
Reargued and Resubmitted November 20, 1996
San Francisco, California

Before: HUG, Chief Judge, GOODWIN, SCHROEDER, FLETCHER, REINHARDT, BRUNETTI, KOZINSKI, T.G. NELSON, HAWKINS, TASHIMA and THOMAS, Circuit Judges.

Opinion by Judge Sidney R. Thomas

THOMAS, Circuit Judge:

This case requires us to consider the effect of two precepts designed to promote consistency and stability in development of the law: the doctrine of law of the case and the presumption against retroactive application of new statutes.

After carefully examining the application of these tenets to this case, we hold that a three-judge panel improperly applied the law of the case when it reversed its prior decision and reimposed a death sentence. However, we hold that law of the case requires only vacation of the death sentence and the convictions for aggravated first degree murder, not the underlying first degree murder convictions. We also hold that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, does not have retroactive effect so as to alter the judgment in this case.

I. BACKGROUND

Patrick James Jeffries allegedly murdered and robbed Phillip and Inez Skiff in Port Angeles, Washington in 1983. Jeffries met the Skiffs while Jeffries was serving a twelve-year prison sentence in Canada for robbery. After his release from prison in January 1983, Jeffries went to live with the Skiffs at their home near Port Angeles, in violation of his parole terms.

On April 2, 1983, the Skiffs' bodies were found buried in shallow graves on their property. Each had been shot repeatedly with .22 caliber bullets, Philip seven times and Inez ten times.

Using the Skiffs' pickup truck, Jeffries left the Skiff property on March 22 or 23, taking with him the Skiffs' portable television, chain saw, placer gold and coins, and other personal property. Jeffries was arrested in Wenatchee on April 7, 1983.

A jury found Jeffries guilty of two counts of aggravated first degree murder under Wash. Rev. Code § 10.95.020 and issued a special verdict finding of two counts of aggravating circumstances permitting imposition of a death penalty, namely: (1) that the murders were committed to conceal the commission of a crime or to protect or conceal the identity of the person committing the crime; and (2) that there was more than one victim and the murders were part of a common scheme or plan or the result of a single act by the defendant. At the penalty phase, the jury found insufficient mitigating circumstances to merit leniency. On November 7, 1983, Jeffries was sentenced to death.

By a 5-4 vote, the Washington Supreme Court affirmed Jeffries' conviction and sentence on direct appeal. State v. Jeffries, 717 P.2d 722 (Wash.) (en banc), cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986). Jeffries filed three personal restraint petitions in state court, all of which the Washington Supreme Court denied. State v. Jeffries, 722 P.2d 99 (Wash. 1986); Petition of Jeffries, 752 P.2d 1338 (Wash.) (en banc), cert. denied, 488 U.S. 948, 109 S. Ct. 379, 102 L. Ed. 2d 368 (1988); Matter of Jeffries, 789 P.2d 731 (Wash. 1990) (en banc).

On July 2, 1990, Jeffries filed a petition for writ of habeas corpus with the U.S. District Court alleging, inter alia, that he was denied his right to a fair trial because one

juror had informed other jurors that Jeffries was a convicted armed robber. The district court authorized discovery on several of Jeffries' claims, including his claim of jury misconduct, and held an evidentiary hearing. On September 5, 1991, the district court rejected each of Jeffries' claims and dismissed the habeas petition. Jeffries v. Blodgett, 771 F. Supp. 1520 (W.D. Wash. 1991). The district court made no findings as to whether the jury misconduct had occurred because it determined that there was no reasonable possibility that the alleged misconduct, even if true, had affected the jury verdict. Id. at 1539.

On appeal, the three-judge panel initially upheld the district court's findings. Jeffries v. Blodgett, 974 F.2d 1179 (9th Cir. 1992) ("Jeffries I"). The panel then granted Jeffries' motion for rehearing. On rehearing, the panel reversed its prior holding on the juror misconduct issue, finding that it conflicted with Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988). Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993) ("Jeffries II"). Defendant Blodgett requested rehearing, with suggestion for rehearing en banc. In Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), cert. denied, 510 U.S. 1191, 114 S. Ct. 1294, 127 L. Ed. 2d 647 (1994) ("Jeffries III"), the panel denied the requested rehearing and amended Jeffries II. The court rejected the suggestion for rehearing en banc. Jeffries III held that the extrinsic information at issue "would have had a 'substantial and injurious effect or influence' on the verdict." Id. at 1191. The case was remanded to the district court "for further proceedings" on the question of juror misconduct in light of Dickson. Id. at 1198.

On remand, the district court found that the jury misconduct had occurred. The district court renewed its opinion that no prejudice resulted from the juror misconduct, but concluded that Jeffries III required a writ of habeas corpus to issue upon a finding of juror misconduct.

Defendant Wood, who replaced Blodgett as Washington's chief prison official, appealed. Under the death penalty procedures adopted for the Ninth Circuit, the same three-judge panel which decided Jeffries I, II, and III was assigned the appeal. See Rule 22-3(a)(3) of the Local Rules of the United States Court of Appeals for the Ninth Circuit. On appeal, the panel reversed its decision in Jeffries III. Jeffries v. Wood, 75 F.3d 491 (9th Cir. 1996) ("Jeffries IV"). The panel decided it had read Dickson "too broadly" and that there was a "principled ground" for distinguishing cases in which improper communication came to the jury through an official external source from cases involving intra-juror communication. Id. at 494. The panel further concluded that law of the case did not prevent reversal of its prior decision because Jeffries III was "'clearly erroneous and would work a manifest injustice.'" Id. (quoting Leslie Salt Co. v. United States, 55 F.3d 1388, 1393 (9th Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 407, 133 L. Ed. 2d 325 (1995)). Jeffries petitioned for rehearing, with suggestion for rehearing en banc. The suggestion for rehearing en banc was granted.

II. LAW OF THE CASE

A. General Considerations

Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal. "The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." In re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996) (quotations omitted); see Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.) ("[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another

panel has decided on a prior appeal in the same case."), cert. denied, 444 U.S. 826, 100 S. Ct. 49, 62 L. Ed. 2d 33 (1979).

Law of the case rules are founded upon "the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." Kimball, 590 F.2d at 771 (quotations omitted). This doctrine also serves to maintain consistency. 18 Charles A. Wright et al., Federal Practice and Procedure § 4478 (1981).

Certainly, law of the case is a discretionary doctrine. "The doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' "Leslie Salt, 55 F.3d at 1393 (quoting Messenger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912)); see also Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is discretionary, not mandatory."). That discretion, however, is not unfettered. "While courts have some discretion not to apply the doctrine of law of the case, that discretion is limited." Thomas v. Bible, 983 F.2d 152, 155 (9th Cir.) (internal citation omitted), cert. denied, 508 U.S. 951, 113 S. Ct. 2443, 124 L. Ed. 2d 661 (1993). The prior decision should be followed unless:" '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate,[1] or (3) substantially different evidence was adduced at a

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[1] Intervening controlling authority includes changes in statutory as well as case law. Cf. Thomas, 983 F.2d at 155 (referring to an "intervening change in the law" as opposed to an "intervening change in controlling authority").

subsequent trial.'" In re Rainbow, 77 F.3d at 281 (quoting Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 675, 133 L. Ed. 2d 524 (1995)); see Leslie Salt, 55 F.3d at 1393; Merritt, 932 F.2d at 1320; Kimball, 590 F.2d at 771-72.

The Jeffries IV panel recognized that the law of the case was an important consideration in reexamining Jeffries III. However, Jeffries IV concluded that Jeffries III fit one of the exceptions to law of the case because the decision was "clearly erroneous and would work a manifest injustice." Jeffries IV, 75 F.3d at 494 (quotation omitted). We disagree and hold that the three-judge panel erred in not adhering to the law of the case, as set forth in Jeffries III.[2]

B. The "Clearly Erroneous" Test

To establish an exception to law of the case, Wood must show that Jeffries III was "clearly erroneous." It was not. In fact, we find no error at all in Jeffries III.

On collateral review, trial errors affecting constitutional rights are subject to a harmless error analysis. Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993); Lee v. Marshall, 42 F.3d 1296, 1298 (9th Cir. 1994). Under the Brecht standard, a petitioner must show that the conduct had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623, 113 S. Ct. at 1714 (quotation omitted). Where the record

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[2] We agree with the panel that neither of the other two exceptions are at issue. Accordingly, our discussion will be limited to the "clearly erroneous" exception to law of the case. Because we must consider the merits of the juror prejudice issue in deciding whether Jeffries III was clearly erroneous, this holding also constitutes a decision on the merits.

is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted. O'Neal v. McAninch, 513 U.S. 432, ___, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947 (1995).

Jeffries III held that the introduction of prejudicial information to a juror violated a defendant's right to a fair trial regardless of whether the source of that information was internal (e.g., another juror) or external (e.g., a bailiff). Jeffries IV stated that Jeffries III was incorrect in that the source of the prejudicial information did matter: if the source were internal rather than external, no presumption of prejudice existed.[3] This distinction was new. No prior case in the circuit had so held.

Juror knowledge of a defendant's past criminal record has long been recognized to be prejudicial. See United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986) (observing that it is extremely difficult for jurors to ignore prior convictions when deciding guilt), modified, 798 F.2d 1250 (9th Cir. 1986). The possible prejudice is even more likely when the past record is related to the crimes for which the defendant is on trial. United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985) (observing "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again"), cert. denied, 475 U.S. 1023, 106 S. Ct. 1215, 89 L. Ed. 2d 326 (1986); United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980) (noting that evidence of past convictions of similar offenses raises the specter of "he did it before, he could do it again").

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[3] "In our application of Dickson v. Sullivan to the petition for rehearing, we read that case too broadly. We failed to discern the significant difference between external contamination of a jury by officers of the court (Dickson) and internal misconduct by a fellow juror . . . ." Jeffries IV, 75 F.3d at 494.

Contrary to Wood's position, we find no defensible distinction to be made based solely on the *source* of the information. Rather, the appropriate focus should be on the nature of the information itself. The Sixth Amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial. Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965); United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner, 379 U.S. at 471, 85 S. Ct. at 549.

Under the Sixth Amendment, a criminal defendant has the right to confront those who testify against him or her and the right to conduct cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed. 2d 40 (1987). When a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause. See United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975); United States ex rel. Owen v. McMann, 435 F.2d 813, 817 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S. Ct. 1373, 28 L. Ed. 2d 646 (1971). That the unsworn testimony comes from a juror rather than a court official does not diminish the scope of a defendant's rights under the Sixth Amendment. See Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995) (holding that a juror's communication about the defendant's reputation for violence deprived the defendant of his rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment).[4]

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[4] In reaching this conclusion we are in accord with almost every other circuit which has addressed the question. See United States v. Swinton, 75 F.3d 374 (8th Cir. 1996); United States v. Perkins, 748

Jeffries III correctly determined that the extrinsic information alleged to have been imparted here, Jeffries' prior robbery conviction, was "especially harmful" given the jury's adoption of two special findings that supported the convictions for aggravated first degree murder and the imposition of the death sentences. Jeffries III, 5 F.3d at 1191.[5] The aggravating circumstances warranting the penalty of death were (1) that the murders were committed to conceal the commission of a crime or the identity of a person committing a crime, and (2) the murders were committed as part of a common scheme or plan. The only crime referenced at trial was the crime known in common parlance as robbery; the only "common scheme or plan" involved the commission of robbery.[6] Thus, the

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F.2d 1519, 1533 (11th Cir. 1984); United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975); United States ex rel. Owen v. McMann, 435 F.2d 813, 817 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S. Ct. 1373, 28 L. Ed. 2d 646 (1971). But see United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir. 1994) ("[I]ntra-jury communications pose a less serious threat to a defendant's right to an impartial trial than do extra-jury influences . . . .").

[5] In order to reach a verdict of aggravated first degree murder, a jury must find the defendant guilty of first degree murder and find one of several defined aggravating circumstances to exist. Wash. Rev. Code § 10.95.020 (1983). If a jury convicts a defendant of aggravated first degree murder, there is a presumption of a life sentence without possibility of parole. If the jury finds that there are insufficient mitigating circumstances to merit leniency, the sentence is death. Wash. Rev. Code §§ 10.95.030 et seq. (1983).

[6] "It is clear from the record that the State's argument was that the defendant killed the victims in order to steal their property." State v. Jeffries, 717 P.2d at 735. The prosecution also suggested that Jeffries murdered Inez Skiff after she had discovered that Jeffries killed her husband to prevent her from exposing Jeffries to the authorities.

introduction of Jeffries' past robbery conviction to jurors was without question extremely prejudicial. See Dickson, 849 F.2d at 406.

We agree with Jeffries III that the communication by its nature was intrinsically prejudicial and necessarily had a substantial and injurious influence on the verdict. Wood argues to the contrary, contending that the jurors engaged in little discussion about the conviction; that the person who made the comment was promptly told by another juror that consideration of the conviction was not permitted; and that two jurors who heard the improper comment stated in affidavits that they did not consider the prior conviction in reaching the verdict. However, these facts do not overcome the inherent prejudice. Jurors' testimony that extrinsic evidence is not harmful is not controlling. United States v. Bolinger, 837 F.2d 436, 440 (11th Cir.), cert. denied, 486 U.S. 1009, 108 S. Ct. 1737, 100 L. Ed. 2d 200 (1988). The effect of extrinsic prejudicial evidence on a juror's deliberation may be substantial even though it is not perceived by the juror and "a juror's good faith cannot counter this effect." United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978) (footnote omitted). Here, at least two jurors had nearly the entire trial to contemplate the impermissible communication.

Various factors might nonetheless suggest that the potential prejudice of the extrinsic information was diminished in a particular case and therefore that the extrinsic evidence did not substantially and injuriously affect the verdict. These factors include: whether the

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See id. at 741.

prejudicial statement was ambiguously phrased;[7] whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;[8] whether a curative instruction was given or some other step taken to ameliorate the prejudice;[9] the trial context;[10] and

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[7] Cf. Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996) (affirming finding of no prejudice in part because the juror's remark -- "pleaded guilty at one time and changed it" -- was "vague and awkwardly phrased"), cert. denied, ___ U.S. ___, 117 S. Ct. 227, 136 L. Ed. 2d 159 (1996).

[8] Cf. Bagley, 641 F.2d at 1241 (affirming finding of no prejudice where trial judge accurately informed the jury that a government witness had not been immunized in part because the trial judge had not previously ruled the information inadmissible); Lawson, 60 F.3d at 613 (finding that introduction of extraneous evidence could not be deemed harmless where "[e]vidence introduced at trial concerning violent acts committed by Lawson was far from conclusive as to Lawson's intent to rob").

[9] Although the efficacy of instructions to ignore a defendant's prior convictions is highly questionable, see Bayramoglu v. Estelle, 806 F.2d 880, 888 (9th Cir. 1986) ("A timely instruction from the judge usually cures the prejudicial impact of evidence unless it is highly prejudicial or the instruction is clearly inadequate."), the potential for prejudice is certainly undiminished when no curative instruction was given and when "the defendant was deprived of the opportunity to rebut the evidence, to discuss its significance in argument to the jury, or to take other steps to lessen its prejudicial impact," Dickson, 849 F.2d at 408.

[10] This would include consideration of the Bayramoglu factors: (1) whether the material was actually received; (2) the length of time the information was available to the jury; (3) the extent to which the jurors discussed and considered it; (4) whether the material was introduced before a verdict was reached; and (5) any other matters which may bear on the issue. Bayramoglu, 806 F.2d at 887.

whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Having considered all of this, we conclude that the Jeffries III decision was not "clearly erroneous" -- indeed that it was correct -- and that the extrinsic material "had a substantial and injurious effect or influence in determining the jury's verdict." Lee, 42 F.3d at 1298 (quotation omitted).

C. The "Manifest Injustice" Requirement

Wood also failed to meet the second prong of the "clearly erroneous" exception to law of the case because she did not demonstrate that a manifest injustice would result from the Jeffries III interpretation.

The existence of exceptional circumstances is required before finding a manifest injustice. Laffey v. Northwest Airlines, Inc., 740 F.2d 1071, 1082 n.19 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 939, 83 L. Ed. 2d 951 (1985); See United States v. Miller, 822 F.2d 828 (9th Cir. 1987). At a minimum, the challenged decision should involve a significant inequity or the extinguishment of a right before being characterized as manifestly unjust.

Wood failed to establish that adherence to law of the case would result in a situation meeting this standard. None of the State of Washington's rights have been extinguished. Retrial and resentencing are available options on remand. Although in some cases the unavailability of witnesses or evidence might result in manifest injustice, the record is devoid of any such showing here. Neither in its briefing, nor at oral argument, was Wood able to make any factual showing of manifest injustice. Thus, we conclude that the panel erred in determining that Jeffries III was "clearly

erroneous and would work a manifest injustice." Jeffries IV, 75 F.3d at 494 (quotation omitted).

D. Impact of Law of the Case on the Jeffries IV Opinion

We are mindful of the danger of reducing law of the case to a set of categorical rules, mechanically applied. Law of the case is not a limitation on judicial power, but rather "a guide to discretion." United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). It is not "a doctrine of inescapable application." Ferreira v. Borja, 93 F.3d 671, 674 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 972 (1997). Law of the case would certainly not prevent a panel from changing its decision pursuant to a proper motion for reconsideration or a petition for rehearing, for example. Given this and the fact that law of the case is not binding on an en banc court,[11] Wood contends we should ignore the issue and decide this case directly on the merits. Although we recognize the discretionary nature of the doctrine, the manner in which panels apply law of the case is an important consideration for en banc review. If, as Wood argues, a panel's discretion is completely unbounded, the coherence and stability of the canon's application largely disappear. Of particular importance in this context is how law of the case should be applied when subsequent panels have relied on the initial decision. In this instance, two Ninth Circuit panels have relied and expanded on Jeffries III. See

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[11] Watkins v. United States Army, 875 F.2d 699, 704 n.8 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957, 111 S. Ct. 384, 112 L. Ed. 2d 395 (1990). Nor would law of the case bind the Supreme Court. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S. Ct. 2166, 2178, 100 L. Ed. 2d 811 (1988).

Lawson, 60 F.3d at 612; Thompson, 74 F.3d at 1575 n.1. When this occurs, a panel must be exceedingly careful in altering the law of its earlier opinion. Otherwise, intra-circuit conflict may arise, posing serious difficulties. Indeed, to reach its decision properly, the Jeffries IV panel would have had to reverse Lawson, which would be impermissible. Only an en banc panel may overturn existing Ninth Circuit precedent. Murray v. Cable Nat'l Broad. Co., 86 F.3d 858, 860 (9th Cir. 1996), cert denied, ___ U.S. ___, 117 S. Ct. 689, 136 L. Ed. 2d 613 (1997).[12] Of additional significance is that further appellate review of Jeffries III was sought and denied prior to the panel's change of heart. The State's suggestion for en banc review of Jeffries III was rejected and its petition for a writ of certiorari by the United States Supreme Court was declined. Jeffries v. Blodgett, 510 U.S. 1191, 114 S. Ct. 1294, 127 L. Ed. 2d 647 (1994).

Thus, even aside from the fact that the Jeffries IV panel erred on the merits of the prejudicial information question, it should not have exercised its discretion to depart from its prior decision given the reliance on the Jeffries III opinion by subsequent panels, the further appellate proceedings in Jeffries III, and the guidelines set forth in Leslie Salt. Accordingly, we withdraw the Jeffries IV opinion and further hold that the district court was correct in issuing a writ vacating the verdict for aggravated first degree murder and the sentence of death.

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[12] The dissent seems to acknowledge that this law of the circuit doctrine would preclude the Jeffries IV panel from contradicting the Jeffries III opinion, thus reaching the same result as the majority.

E. The Underlying First Degree Murder Conviction

One issue regarding application of law of the case remains: the underlying conviction for first degree murder. Under Washington law, a jury must find the defendant guilty of first degree murder before finding the defendant guilty of aggravated first degree murder. Wash. Rev. Code § 10.95.020 (1983). First degree murder is considered a lesser included offense of aggravated first degree murder. See State v. Pirtle, 904 P.2d 245, 263 (Wash. 1995) (en banc), cert. denied, ___ U.S. ___, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). In the guilt phase of Jeffries' trial, the jury was instructed on the elements of first degree murder.

Jeffries III addressed only the aggravated first degree murder convictions and death sentences.[13] Jeffries III did not hold that the communication of extraneous information required the underlying conviction for first degree murder to be vacated. Jeffries III focused on the jury's special findings, which affected only the jury's decision to convict Jeffries of aggravated first degree murder and sentence him to death. Jeffries III decided that internal juror misconduct could be prejudicial in that context, vacated the grant of summary judgment on the issue, and remanded the case for further proceedings in the district court in light of Dickson. Jeffries III, 5 F.3d at 1198.

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[13] The district court apparently concluded that Jeffries III meant that a writ of habeas corpus should issue as to the entire conviction if the district court found that the juror misconduct actually occurred. We disagree with this reading of Jeffries III and the district court's construction is not binding on us. See Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715 (9th Cir. 1990).

Jeffries' counsel acknowledged in a letter to the three-judge panel that strict application of law of the case under these circumstances might require sustaining the first degree murder conviction. Thus, to be true to our law of the case holding, we must reverse the portion of the district court's writ that vacates the underlying first degree murder conviction.

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

A. Introduction

On April 24, 1996, prior to the grant of rehearing in this case, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("Act"), became law. Since then, the Second, Third, and Tenth Circuits have held that the Act cannot be applied retroactively to actions filed prior to the enactment date. See Boria v. Keane, 90 F.3d 36, 38 (2d Cir. 1996); Burkett v. Love, 89 F.3d 135, 138 n.2 (3d Cir. 1996); Edens v. Hannigan, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996). The Fifth, Seventh, and Eleventh Circuits have held that the Act applies to cases pending at the time of its enactment. See Hunter v. United States, 101 F.3d 1565, 1573 (11th Cir. 1996); Drinkard v. Johnson, 97 F.3d 751, 766 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856, 867 (7th Cir. 1996) (en banc), cert. granted, ___ U.S. ___, 117 S. Ct. 726, 136 L. Ed. 2d 643 (1997).

After receiving briefs and hearing oral argument on the Act's effect on this case, we announced our decision that the amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date. Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) (en banc). We published our

decision prior to issuing an opinion because of the number of pending cases which depended on resolution of this issue, promising to detail our rationale in this full opinion.[14]

B. General Retroactive Effect of the Act

The presumption against retroactive application of new laws "is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. "Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994) (footnote omitted). It is "an essential thread in the mantle of protection that the law affords the individual citizen." Lynce v. Mathis, _____ U.S. _____, 117 S. Ct. 891, 895, 134 L. Ed. 2d 775 (1997).

To be sure, Congress has the power to enact legislation with retroactive effect so long as it comports with due process by passing constitutional muster under rational basis scrutiny. Gray v. First Winthrop Corp., 989 F.2d 1564, 1570 (9th Cir. 1993). "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches[.]" Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729, 104 S. Ct. 2709, 2717-18, 81 L. Ed. 2d 601 (1984). However, because

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[14] We recognize that the Supreme Court has granted a writ of certiorari in Lindh. Normally, we would have deferred submission until the Court had issued its opinion. However, we announced our decision prior to the grant of certiorari and the contours of our decision are now being litigated before this circuit. Thus, we believe the opinion should be issued, but acknowledge the potential impact of Lindh.

retroactive application of new laws disrupts settled expectations and actions taken in reliance on them, courts will not presume retroactive effect absent express statutory language. "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." United States v. Heth, 7 U.S. (3 Cranch) 399, 413, 2 L. Ed. 479 (1806).

Landgraf altered the legal landscape so that prospective application has unquestionably become the default rule. 511 U.S. at 272, 114 S. Ct. at 1501. It established a three-stage analytical process for assessing the potential retroactive application of a statute. The first Landgraf question is whether Congress has prescribed the statute's proper reach. Landgraf, 511 U.S. at 280, 114 S. Ct. at 1505. To make this determination, we employ the ordinary tools of statutory interpretation. In doing so, we are informed, of course, by the presumption against retroactive application and the requirement that if Congress is to rebut the presumption it must state its intention in words "clear, strong, and imperative" such "that no other meaning can be annexed to them." Heth, 7 U.S. (3 Cranch) at 413.

If congressional intent cannot be divined from examination of the statute, the second Landgraf inquiry is whether the new statute would have retroactive effect (i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed). Landgraf, 511 U.S. at 280, 114 S. Ct. at 1505. The third Landgraf stage is conclusory: if the new legislation would operate retroactively, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Id. Because we find Congress expressed its intent in the statutory language, we

need only reach the first stage of the Landgraf analysis.

At issue is Title I of the Act, which reforms federal habeas corpus law in two significant ways. First, Title I amended existing statutory provisions contained in Chapter 153, Title 28 of the United States Code. Second, it added a new chapter, Chapter 154, to Title 28 which provided for new special habeas corpus procedures in capital cases. Jeffries' appeal involves the potential retroactive effect of the amendments to Chapter 153 contained in Title I.

The first stage of the Landgraf analysis is to determine whether Congress has expressed its intent. In statutory interpretation, the starting point is always the language of the statute itself. United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1213 (9th Cir. 1996). In constructing Title I, Congress left little doubt as to the respective effective dates. Section 107(c) provides that Chapter 154 applies to all pending cases.[15] However, in describing the temporal reach of Title I, Congress did not apply the same language to the amendments to Chapter 153. Thus, a plain reading of section 107(c), coupled with the normal presumption of prospectivity, leads to the conclusion that the Chapter 153 amendments do not apply to pending cases.

The structure of Chapter 154 contains further evidence of congressional purpose. Chapter 154 incorporates by reference several provisions of Chapter 153, incorporation which would be completely superfluous if Congress intended both chapters to apply to pending

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[15] The effective date for Title I was established in section 107(c) of the Act:

> EFFECTIVE DATE. -- Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

cases. See, e.g., 28 U.S.C. § 2264(b). The absence of such a statutory interplay was a factor in Landgraf's determination of whether Congress had made a purposeful decision as to an effective date for various provisions of the Civil Rights Act of 1991. 511 U.S. at 262-63, 114 S. Ct. at 1495-96.

The Act's direct legislative history also underscores the clarity of congressional design. Title I comprises what originally was separate and independent habeas corpus reform legislation, which passed the U.S. House of Representatives on February 8, 1995, as H.R. 729, 104th Cong. (1995). 141 Cong. Rec. H1434 (daily ed. February 8, 1995). After transmittal to the U.S. Senate, H.R. 729 was referred to the Senate Judiciary Committee where it was inserted in its entirety into S. 735, 104th Cong. (1995), the pending antiterrorism legislation. As passed by the House, H.R. 729 did not provide for an effective date for either the Chapter 153 revisions or the new Chapter 154 procedures. When H.R. 729 was substituted into S. 735, the Senate Judiciary Committee made one substantive change: the addition of section 107(c) containing the effective date for Chapter 154. Compare original S. 735, 141 Cong. Rec. S5803 (daily ed. April 27, 1995), with S. 735 as revised by Amendment 1199, 141 Cong. Rec. S7857-77 (daily ed. June 7, 1995). As amended, S. 735 passed the Senate on June 7, 1995. 141 Cong. Rec. S7857 (daily ed. June 7, 1995). The habeas provisions were adopted without alteration by the Conference Committee on April 15, 1996. 142 Cong. Rec. H3305-33 (daily ed. April 15, 1996). Title I was signed into law along with the remainder of the Act on April 24, 1996. These affirmative congressional acts stand in contrast to the legislative history of the Civil Rights Act of 1991 considered in Landgraf which led the Court to conclude "that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct." 511 U.S. at 263, 114 S.

Ct. at 1496. In Landgraf, the history revealed "no evidence . . . that an agreement had been tacitly struck" and contained "little to suggest that Congress understood or intended the interplay" of the various provisions at issue. Landgraf, 511 U.S. at 262-63, 114 S. Ct. at 1495-96 (emphasis omitted).

In statutory construction, we presume Congress legislated with awareness of relevant judicial decisions. Cannon v. University of Chicago, 441 U.S. 677, 696-704, 99 S. Ct. 1946, 1957-61, 60 L. Ed. 2d 560 (1979). Congress's deliberate choice to include a specific retroactive application provision for Chapter 154 but none for Chapter 153 should be given effect. If Congress had intended that the amendments to Chapter 153 apply to pending cases, it would have stated so unequivocally. Congress did not do so, much less rebut the presumption against retroactive application of new laws with a clear statement to the contrary, and we are compelled to give force to that decision. Thus, we find congressional intent as to Title I's proper reach to be defined in section 107(c).

In so concluding, we respectfully differ with our colleagues in the Eleventh Circuit that Congress was silent on the subject of retroactivity, requiring examination under subsequent steps of the Landgraf analysis. Hunter, 101 F.3d at 1570; see Drinkard, 97 F.3d at 766. The explicit circumscription of an effective date for Title I in section 107(c), the interrelation of the amendments to Chapters 153 and 154 in the Act, and the distinct expression of Congressional intent through the direct legislative history, all indicate "a deliberate congressional choice with which the courts should not interfere. " Central Bank v. First Interstate Bank, 511 U.S. 164, 184, 114 S. Ct. 1439, 1452, 128 L. Ed. 2d 119 (1994).

We also respectfully disagree with our colleagues on the Seventh Circuit who have rejected the idea that congressional intent as to the Act's retroactivity can be

determined. Lindh, 96 F.3d at 861-62. They reason that direct statutory construction of Title I depends on application of a negative inference argument, a doctrine they maintain was repudiated by the Supreme Court. Id.; see Landgraf, 511 U.S. at 259-60, 114 S. Ct. at 1494. This principle of statutory construction is also known as *expressio unius est exclusio alterius* (an express declaration as to one item requires the exclusion of others). The argument for its application concerning Title I of the Act is that because section 107(c) specifically prescribes that Chapter 154 apply to pending cases and the Act is silent as to the effective date of the Chapter 153 amendments, there is a negative inference that the amendments to Chapter 153 do not apply to pending cases.

As we have demonstrated, one need not resort to negative inference to resolve this issue. Not only is the statutory language clear, but we find the direct legislative history persuasive -- a factor not discussed in Lindh, Drinkard, or Hunter. However, the principle of *expressio unius est exclusio alterius* does add additional support to our conclusion.[16] In examining the potential application of negative inference, we are first constrained to note that Landgraf does not preclude the use of the analysis in a proper case. It merely rejected its application in the

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[16] The Second Circuit relied upon negative inference to conclude that Congress did not intend the Act to apply to pending cases. As the court noted in Boria v. Keene, 90 F.3d 36, 38 (2d Cir. 1996):

> Against this background, we look to the new statute to see if Congress has indicated an intent for it to apply to pending cases. While Congress has spoken clearly in some portions of the new statute with respect to the application to pending cases, (examples omitted) in the context of non-capital habeas cases the statute's silence is striking. This silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case.

context of the Civil Rights Act of 1991. Landgraf, of course, involved precisely the opposite circumstance to the one at bar. In Landgraf, the plaintiff was attempting to employ a negative inference argument from unrelated isolated sections of the Civil Rights Act of 1991 to overcome the presumption against retroactive application -- an argument appropriately rejected by the Court. In this instance, unlike Landgraf, a negative inference analysis reinforces the presumption. Thus, we are true to Landgraf's holding that "prospectivity remains the appropriate default rule." Id. at 272, 114 S. Ct. at 1501.

Wood, following Lindh's lead, argues we should leap over statutory analysis and conduct a judicial examination of retroactive effect any time Congress does not provide an effective date for a section. This troubling interpretation of Landgraf would arrogate to the judiciary the privilege of determining effective dates of statutory sections by fact-intensive speculation as to a statute's potential impact on past conduct. We do not read Landgraf to command that an act's retroactive effect should always be decided by the courts unless Congress specifies the effective date in each section of a statute. Indeed, this construction would frustrate Landgraf's philosophy which "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." Id. at 273, 114 S. Ct. at 1501. Although appropriate in construction of some statutes, judicial analysis of retrospective effect as a means of determining effective date should be the exception, not the default rule. Rather, the intent of Congress should remain the focal point for statutory construction. Only if the courts are unable to determine congressional intent from examination of the statute and its history, as informed by Landgraf's default rule of prospectivity and the presumption against retroactive application, should they engage in the type of individualized examination required by the subsequent

stages of the Landgraf analysis.

Wood correctly points out that there are a number of provisions in other titles of the Act which have differing effective dates.[17] Wood maintains that the existence of other dates undermines any possible significance of a negative inference analysis and that we ought not attach too much significance to section 107(c). This reasoning ignores the fact that Title I originated as separate, independent legislation unrelated to other portions of the Act. Landgraf examined this very situation and concluded that Congress's temporal prescription as to discrete sections of an act is not controlling as to other independent sections of the same statute. Landgraf, 511 U.S. at 257-63, 114 S. Ct. at 1493-96. That aphorism is particularly apt here. The Act encompasses a wide variety of divergent subjects, from biological weapons to immigration reform.[18] Because of this, each title must be deconstructed separately. Title I is internally consistent, as would be expected of a title which originated as separate legislation, and its temporal reach discernible. Thus, the existence of other effective dates outside of Title I is of little significance.

Accordingly, we find the first stage of the Landgraf analysis conclusive and need not reach the subsequent

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[17] See, e.g., sections 221(c), 401(f), 414(b), 440(f), 607, 732(e)(2), and 903(c).

[18] The Act is divided into nine titles, namely: Title I (Habeas Corpus Reform); Title II (Justice for Victims); Title III (International Terrorism Prohibitions); Title IV (Terrorist and Criminal Alien Removal and Exclusion); Title V (Nuclear, Biological, and Chemical Weapons Restrictions); Title VI (Implementation of Plastic Explosives Convention); Title VII (Criminal Law Modifications to Counter Terrorism); Title VIII (Assistance to Law Enforcement) and Title IX (Miscellaneous).

stages of the examination. However, because Wood and some of our sister circuits have devoted substantial analysis to assessing the Act's potential retroactive effect, some scrutiny under the second Landgraf inquiry is warranted.

Landgraf's second analytic step is determining whether the statute would have retroactive effect. To answer this, we "must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf, 511 U.S. at 269-70, 114 S. Ct. at 1499. In this case, we have already determined that under pre-Act law, Jeffries must be resentenced. Wood argues that the Act would preclude this result. Thus, under Wood's theory, if the Act is applied to Jeffries, he will be executed; if it does not, he will be resentenced. Even applying only our "sound instincts", as Landgraf suggests we should, execution would seem to be a "new legal consequence." Id. (internal quotation omitted). Surely, our judicial instincts tell us, if imposing civil compensatory damages is a "new legal consequence" under Landgraf, death by lethal injection must fit the category. When we go beyond our instincts to examine the theoretical underpinnings of the Act, we can discern why retroactive application is not only counter-intuitive, but legally improper. Landgraf again provides the analytical framework.

Landgraf identified three examples of laws which generally do not have retroactive effect: (1) those which authorize or affect the propriety of prospective relief; (2) those which confer or oust jurisdiction and (3) those which make changes to procedural rules. 511 U.S. at 273-75, 114 S. Ct. at 1501-02.

Legislation which operates in *futuro* by definition generally does not have retroactive implications. The classic example is injunctive relief which proscribes present and future conduct. See, e.g., American Steel Foundries v. Tri City Central Trades Council, 257 U.S. 184, 42 S.

Ct. 72, 66 L. Ed. 189 (1921) (holding that the Clayton Act's provisions on injunctive relief applied to pending cases). However, habeas corpus relief involves precisely the opposite circumstance. In a federal habeas proceeding, a state prisoner seeks to vitiate a prior state court decision. A federal court's habeas corpus power is to correct an invalid antecedent state conviction or sentence. Thus, federal habeas relief is inherently "quintessentially backward looking" under Landgraf. 511 U.S. at 282, 114 S. Ct. at 1506.

Similarly, Title I does not confer or oust federal jurisdiction. Jurisdictional statutes concern the power of the court, not the rights or obligations of the parties. 511 U.S. at 274, 114 S. Ct. at 1502. Section 440(a) of the Act, which removes federal jurisdiction over certain immigration matters, is a paradigmatic jurisdictional provision which we found applicable to pending cases in Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996). By contrast, nothing in the amendments to 28 U.S.C. § 2254(d) which are at issue here "ousts" federal courts of jurisdiction. Rather, Title I dictates how federal courts should exercise their jurisdiction. The Act does not prohibit federal courts from entertaining petitions for writs of habeas corpus; it instructs that the writ "shall not be granted" unless certain criteria are satisfied. 110 Stat. at 1219. Thus, the amendments to Chapter 153 are not "jurisdictional" as that term is contemplated by Landgraf.

Finally, the amendments to Chapter 153 are not procedural. Statutes implicating venue are illustrative of procedural changes which do not have retroactive effect. See, e.g., Ex parte Collett, 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949). As Landgraf notes, parties generally have a diminished reliance interest in procedural matters. 511 U.S. at 275, 114 S. Ct. at 1502. However, as Landgraf acknowledged, "the mere fact that a new rule is procedural does not mean that it applies to every pending

case." 511 U.S. at 275, 114 S. Ct at 1502 n.29. Courts must look to the nature and posture of an individual case. Id.

The amendments to Chapter 153 implicate substantive as well as procedural issues. The Act limits the ability of federal courts to reexamine questions of law and mixed questions of law and fact. Historically, federal habeas courts have reviewed all questions of law and mixed questions of law and fact de novo. Wright v. West, 505 U.S. 277, 299-304, 112 S. Ct. 2482, 2494-97, 120 L. Ed. 2d 225 (1992) (O'Connor, J., concurring). Under the amendments to Chapter 153, federal courts must restrict their legal analysis to whether the state decision was contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Act further restricts the scope of federal review of mixed questions of fact and law. 28 U.S.C. § 2254(e). De novo review is no longer appropriate; deference to the state court factual findings is. These statutory alterations fall within the very genre of intertwined procedural and substantive issues which compelled the Landgraf court to conclude that altering the right to a jury trial was not purely a procedural question. 511 U.S. at 280-81, 114 S. Ct. at 1505. Similarly, because substance and procedure are inextricably impacted by Title I, the amendments cannot be viewed as having purely procedural implications.

Thus, the amendments to Chapter 153 cannot be classified under the general Landgraf denomination of statutes which have no retroactive effect.

Wood also contends that the amendments to Chapter 153 cannot create "new legal consequences" because Title I only impacts "secondary" rather than "primary " conduct. Under Wood's argument, the criminal act is the "primary" conduct. Wood reasons that a criminal would be unlikely to rely on the availability of federal habeas relief in

committing a crime or making tactical litigation decisions. Therefore, Wood argues, prisoners could not have relied upon the availability of federal habeas relief to their detriment, no "settled expectations" have been disturbed and there are no new legal consequences to the underlying conduct.

Taken to its logical conclusion, Wood's argument means that no change in federal habeas law could ever have retroactive effect. Indeed, other than a true *ex post facto* law criminalizing a previously legal act, no change in criminal law could ever have retroactive effect under Wood's theory. The fallacy in this reasoning is that, with the exception of actual innocence cases, federal courts never adjudicate guilt in state prisoner habeas proceedings. The "primary" conduct described by Wood is never at issue. Rather, federal habeas relief is dependent upon an unconstitutional state court adjudication. A state prisoner's right to federal habeas relief is created by the entry of an unconstitutional state court judgment subjecting the prisoner to incarceration or death. Thus, the "primary" conduct implicated by federal habeas procedure is the state court proceeding, not the underlying criminal act. The prisoner's "settled expectations" are thus created when the state has placed him or her in custody in violation of the Constitution. Modifying the remedies available to the state prisoner to the point of transforming the legal outcome must necessarily constitute a "new legal consequence " under Landgraf.

These are generic considerations which caution against general retroactive application of the amendments to Chapter 153. Landgraf commands that if this analytical stage is reached, courts must "evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." 511 U.S. at 280, 114 S. Ct. at 1505. Because we are satisfied as to congressional intent,

we have not engaged in the specific inquiry required in the second Landgraf analytical stage.

Given the complexity of the procedural aspects of Title I, requiring universal subsequent stage analysis would have the highly undesirable effect of forcing courts to conduct a separate inquiry in each case as to its particular procedural posture. Besides being an unnecessary and considerable expenditure of judicial resources, such a practice would result in conflicting determinations of whether the Act applies, depending upon the case. This kind of applicability potpourri cannot be what Congress intended. As literally thousands of pending prisoner cases exist, such inquiry can only result in an unwieldy patchwork of decisions devoid of any overall coherence. Our sound judicial instincts and common sense dictate that justice and judicial economy are better served by applying the Act to cases filed after the enactment date. That result would avoid unnecessary judicial chaos, while fully implementing congressional will as to habeas petitions filed after the enactment date.

Because Congress has addressed the effective date of the relevant provisions of Title I, we conclude that the amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date. Because Jeffries' habeas petition was filed prior to April 24, 1996, the Act does not apply to his case.

C. Effect of the Act, if Applied, to Jeffries

The parties were requested to brief and argue the impact of the Act, if applied, to Jeffries. Although we need not reach this issue because of our determination that the Act does not apply, we have elected to do so in the interest of completely deciding the issues presented and avoiding any further delay should our retroactivity analysis

be altered by the Supreme Court in its pending decision in Lindh.

The Act amends 28 U.S.C. § 2254(d) to provide that no habeas relief may be granted to a person in custody pursuant to a judgment of a state court unless the claimed error:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Act requires us to give great deference to the state court's factual findings. Newly amended section 2254(e)(1) states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Our sister circuits have examined standards of review under the Act, and we find their conclusions persuasive. State court conclusions of law, addressed by section 2254(d)(1), should be examined de novo. Lindh,

96 F.3d at 869; see Drinkard, 97 F.3d at 768. State court findings of fact must be given deference unless "adjudication of the claim 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence [presented in the State court proceeding].'" Drinkard, 97 F.3d at 767 (quoting section 2254(d)(2)). Certainly, a state court factual determination is unreasonable if it is "so clearly incorrect that it would not be debatable among reasonable jurists." Drinkard, 97 F.3d at 769; Moore v. Johnson, 101 F.3d 1069, 1076 (5th Cir. 1996). As to more debatable factual determinations, "the care with which the state court considered the subject" may be important. Lindh, 96 F.3d at 871. "[A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment." Id.

In this case, there is no debate about whether one of the Washington Supreme Court's critical factual findings was correct. It unfortunately was not. The Washington Supreme Court denied relief on the juror misconduct issue because it found that the misconduct was not reported until over two and a half years after it occurred. See State v. Jeffries, 722 P.2d at 100-01 ("Over two and a half years passed between the trial and the time the alleged misconduct was discovered, indicating that the jurors involved did not believe the misconduct to be significant."). Clear and convincing evidence to the contrary of this finding exists: Jeffries submitted an affidavit to the trial court by juror Kathleen Sims dated November 16, 1983, mere days after the jury verdict. Jeffries listed this affidavit as part of his designated appellate record in his direct appeal. Thus, the true facts were part of the "evidence presented in the state court proceedings," as

required by the Act.[19] Indeed, neither party disputes that the Washington Supreme Court factually erred on this pivotal point.[20] Because the linchpin of the court's reasoning depended upon a demonstrably erroneous factual finding, we must conclude that the Act would not prevent relief.

There is an additional reason why the Act would not preclude a federal habeas corpus remedy. In its 1986 decision, the Washington Supreme Court required Jeffries to show actual and substantial prejudice from the alleged juror misconduct. Jeffries, 722 P.2d at 100. This was

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[19] The critical evidence was timely presented to the state trial court in support of a motion for new trial and made a part of the record before the Washington Supreme Court. The dissent suggests that because Jeffries did not include the Sims affidavit in his personal restraint petition, the Act prevents us from considering it. However, the Act requires examining the "merits in State court proceedings" based on "evidence" presented in the "State court proceeding." 28 U.S.C. § 2254(d). The use of the plural indicates that we evaluate the state court proceedings in aggregate. Further, except in rare circumstances, "evidence" is presented to a trial court, not an appellate tribunal, adding additional support to our conclusion. A contrary interpretation would impose the impractical requirement that the voluminous trial court record be attached to each separate appellate petition in order to be considered. The dissent's suggestion that defendants would conceal an error is unlikely given the risk of procedural default.

[20] The court's error may be partly explained by Jeffries' submission of new affidavits bearing a later date and the sheer volume of Jeffries' brief (248 pages on direct appeal) without mention of Sims' 1983 affidavit. However, as we have noted, the crucial affidavit was timely presented to the state trial court and was part of the appellate record before the Washington Supreme Court. If this were a disputed fact which required interpretation, we would defer to our colleagues on the Washington Supreme Court. However, both parties agree this factual determination was incorrect. It was not "debatable among reasonable jurists." Drinkard, 97 F.3d at 769.

error under the Supreme Court precedent in existence at the time. When the Washington Supreme Court made its decision, the Supreme Court was applying the harmless error standard found in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), to habeas cases. See, e.g., Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). Under Chapman's harmless error standard, "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24, 87 S. Ct. at 828. The Washington Supreme Court erred in requiring Jeffries to shoulder the burden of proof on prejudice, contrary to clearly established federal law as determined by the Supreme Court.

Thus, because the Washington Supreme Court's decision was based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings and was contrary to clearly established federal law, the Act if applied would not preclude the issuance of a writ of habeas corpus.[21]

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[21] There are at least two further grounds for concluding that the Act would not preclude habeas relief in this case. The Act provides that an "application for a writ of habeas corpus shall not be granted" unless the new standards in the amended section 2254(d) are met. 110 Stat. at 1218-19. In this case, the district court issued the writ of habeas corpus over a year before the Act became law, and its decision was correct under the law in effect at that time. Because we are not considering whether to order the district court to issue a writ, but are merely affirming the prior issuance of the writ by the district court, the Act does not preclude relief. Moreover, the question before us was whether, under the law of the case doctrine, the panel acted properly in purporting to reverse its pre-Act decision. We have concluded it did not, and that its pre-Act decision was correct. We do not believe that the Act was intended to preclude a decision of this type and nothing in Title I would so indicate.

IV. JUDGMENT

The opinion in Jeffries IV, 75 F.3d 491 (1996), is withdrawn. The judgment of the district court, issuing the conditional writ of habeas corpus, is **AFFIRMED** in part, insofar as it applies to petitioner's convictions for aggravated first degree murder and his sentences of death, and **REVERSED** in part, insofar as it applies to the underlying verdicts and convictions of first degree murder. This matter is remanded to the district court for entry of an appropriate order for resentencing and further proceedings consistent with this opinion.

COUNSEL

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Jeffries v. Wood, No. 95-99003

KOZINSKI, Circuit Judge, with whom Judges **GOODWIN, BRUNETTI, T.G. NELSON** and **HAWKINS** join, dissenting.

I

If you listen closely, perhaps you too can hear what the majority hears: the sounds of silence. Congress said nothing about section 2254(d)'s temporal scope anywhere in Chapter 153 of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214. Under Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994), we must therefore inquire whether section 2254(d) has a retroactive effect; if it does not, it must be applied to pending cases. The majority struggles to avoid this inquiry because it leads to the inescapable conclusion that section 2254(d) applies to this case. See, e.g., Drinkard v. Johnson, 97 F.3d 751, 764-66 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997); Lindh v. Murphy, 96 F.3d 856, 861-67 (7th Cir. 1996) (en banc), cert. granted, 117 S. Ct. 726 (1997). Thus, the majority must make the unusual argument that Congress expressed itself on the retroactivity question, even though it said nothing at all about it. This oxymoronic conclusion is wrong for two reasons. First, it's based on a misreading of Landgraf. Second, it's just not true; there's no evidence Congress intended anything.

A

The cornerstone of the majority's argument is its assertion that "Landgraf altered the legal landscape so that prospective application has unquestionably become the default rule." Maj. op. at 5716. According to the

majority, when Congress did not address the retroactivity question in passing Chapter 153, it did so with this default rule in mind, and thus meant to endorse prospective application only. But this is not what Landgraf said, so it's hardly what Congress could have had in mind.[1]

In fact, Landgraf was designed to preclude this precise argument. In Landgraf, the Supreme Court confronted a perceived conflict between two judicially-created rules for interpreting statutes that do not specify a temporal reach: the presumption against retroactive application and the contrary presumption that each case is governed by the law in effect at the time of decision. See 511 U.S. at 264. Courts often broke this inferential equipoise by following one of the presumptions and ignoring the other, much like the majority does today. Landgraf tried to fix this problem by explaining that the presumptions apply to different types of laws, and thus don't really conflict. Courts must first figure out which kind of law is at issue, and then apply the appropriate presumption.

The key to understanding Landgraf therefore is grasping the difference between a "retroactive law" and, what our court has called, a "retrospective law." See United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1407-08 (9th Cir. 1995), cert.

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[1] The majority's claim that Landgraf announced a default rule of prospective application is based on a single sentence whose meaning the majority distorts by ripping it out of context. Landgraf, 511 U.S. at 272. On the very next page from the one on which the majority's key sentence appears, the Court declares: "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." Id. at 273 (emphasis added). How can this be squared with the majority's claim that "prospective application has unquestionably become the default rule"? See Maj. op. at 19.

denied, 116 S. Ct. 1319 (1996). Contrary to popular misconception, not all laws that apply to pending cases are "retroactive." See Landgraf, 511 U.S. at 269-70. Only a law that would have a "retroactive effect," i.e., that would impair substantive rights on which a party relied when it acted or that would upset settled expectations, is deemed retroactive. General Dynamics, 61 F.3d at 1407-08. Laws that have no "retroactive effect" when applied to pending cases are deemed, in our circuit, "retrospective" laws. Id. at 1408. The presumption against retroactive laws is only triggered by "the class of new statutes that would have genuinely 'retroactive' effect." Landgraf, 511 U.S. at 277. This makes not only semantic sense, but common sense as well: Courts are leery of retroactive laws because they can be very unfair, so the presumption is triggered only when a "retroactive effect" is threatened. Id. at 272. If a statute has no retroactive effect, the opposite presumption kicks in: The law in effect at the time of decision applies, and thus retrospective laws are presumed to apply to pending cases. Id. at 277; see also Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974). As a result, before courts apply judicial default rules, they must determine whether a statute would have a retroactive effect. See, e.g., General Dynamics, 61 F.3d at 1407-08; United States v. $814,254.76 in U.S. Currency, 51 F.3d 207, 211-12 (9th Cir. 1995).

So, does Section 2254(d) have a retroactive effect? The answer is plainly no. While we won't repeat the arguments made by the Eleventh, Fifth, and Seventh Circuits, see Hunter v. United States, 101 F.3d 1565, 1571-73 (11th Cir. 1996) (en banc), petition for cert. filed, 65 U.S.L.W. 3648 (Mar. 10, 1997) (No. 96-1443); Drinkard, 97 F.3d at 766; Lindh, 96 F.3d at 863-68, we note that section 2254(d) is paradigmatic of laws lacking any retroactive effects. Landgraf singled out three types of laws that generally have no retroactive effect: laws that (1)

"authorize[ ] or affect[ ] the propriety of prospective relief"; (2) "confer[ ] or oust[ ] jurisdiction"; and (3) make "[c]hanges in procedural rules." Landgraf, 511 U.S. at 273-75. Based on those categories, section 2254(d) scores a hat-trick: It's (1) a procedural change, (2) jurisdictional in nature, that (3) merely regulates the power of federal courts to grant prospective relief--a writ of habeas corpus. See Lindh, 96 F.3d at 863-68. The majority's arguments to the contrary are fully answered by Lindh. Compare maj. op. at 28-30 with Lindh, 96 F.3d at 863-68. Were section 2254(d) to attach new legal consequences to past conduct, presumably Jeffries could point to something that he would have done differently had he known about those new consequences. See Landgraf, 511 U.S. at 282 (a law has a retroactive effect if it's "the type of legal change that would have an impact on private parties' planning"). Obviously, Jeffries hasn't argued that he killed the Skiffs relying on the state of federal habeas law as it existed before the 1996 Act. He also hasn't pointed to anything he would have done differently in litigating his claim in the state courts had he known federal habeas review would be curtailed; he presented this exact juror misconduct claim to the state courts. See State v. Jeffries, 722 P.2d 99, 100-01 (Wash. 1986); see also Personal Restraint Petition, Washington v. Jeffries, No. 52323-1 (Wash. Dec. 17, 1985). The majority seems to admit that there is nothing that Jeffries would have done differently when it states that "the primary conduct implicated by federal habeas procedure is the state court proceeding." Maj. op. 31. But, in determining whether a law has a retroactive effect, petitioner must point to some aspect of his conduct that he undertook in reliance on the prior law.

The fact that applying section 2254(d) to Jeffries's case may alter the outcome to his detriment doesn't alone make it retroactive, as almost every change in law will have an outcome determinative effect--else why bother

passing a law at all? Compare Boria v. Keane, 90 F.3d 36, 37 (2d Cir.) ("Assuming . . . that the new statute would require a different outcome, application of the new statute to these circumstances would be retroactive."), petition for cert. filed, 65 U.S.L.W. 3342 (Oct. 11, 1996) (No. 96-628) with Landgraf, 511 U.S. at 269 (a law doesn't have a retroactive effect "merely because it . . . upsets expectations based in prior law"). That the legal consequence at stake here is the death penalty makes no difference, unless "our 'sound instincts' " tell us that death is also different when it comes to retroactivity jurisprudence. But see maj. op. at 27.

We also note that the majority's retroactive effect argument is incompatible with two recent Supreme Court decisions. According to the majority, at the moment an unconstitutional state judgment is entered, a prisoner's right to habeas relief vests, and it would be unfair to take away this right because the law changed in the interim. See maj. op. at 31. The majority therefore argues that the 1996 Act would have a retroactive effect if applied to cases where the state proceedings were completed before April 24, 1996. If the majority's argument is sound, then the Court committed a grievous error in Felker v. Turpin, 116 S. Ct. 2333 (1996), in which it applied the 1996 Act's bar on successive petitions to a petitioner whose state court proceedings were completed long before April 24, 1996. See id. at 2336. Moreover, in Lockhart v. Fretwell, 506 U.S. 364 (1993), the Supreme Court rejected an argument similar to the majority's claim that a prisoner has "settled expectations" in the state-court judgment subjecting him to incarceration. See maj. op. 31. In Fretwell, the Court held that "[a] federal habeas petitioner has no interest in the finality of the state-court judgment under which he is

incarcerated." 506 U.S. at 373.[2] Because section 2254(d) has no retroactive effect, it's presumed to apply to Jeffries's case. See Bradley, 416 U.S. at 711.

Perhaps aware of the weakness of its argument that this is a retroactive law, the majority goes to great lengths in arguing that Congress expressly resolved the retroactivity question. See maj. op. at 27 ("[W]e find the first stage of the Landgraf analysis conclusive and need not reach the subsequent stages of the examination."). But Congress said nothing about retroactivity here; the majority therefore comes up with a legal misnomer, the express implied statement. See maj. op. at 20-27. How a statement can be both express and implied is beyond me, but the fact remains that Congress said nothing on the subject, and this is clearly insufficient under Landgraf to avoid the retroactive effect analysis; only an explicit statutory command will do:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. . . . When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect . . . .

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[2] In Fretwell, petitioner had a colorable ineffective assistance of counsel claim based on precedent existing at the time his state proceedings were completed. See Fretwell, 506 U.S. at 367. However, by the time his federal habeas proceedings got underway, the precedent had been overruled. Id. at 368. Applying the intervening law, the Court rejected his ineffective assistance claim. Id. at 373. In doing so, the Court rejected the argument that applying the intervening precedent would be unfair because it would upset the petitioner's interest in habeas relief created upon entry of the final state-court judgment. See id. at 372-73. We must reject the same argument here.

511 U.S. at 280 (emphasis added).

Unlike the majority, we cannot read this requirement as being satisfied by anything short of a clear statement in the statute. Perhaps the majority's interpretation would be linguistically plausible if the Supreme Court had omitted the words "express" and "expressly" from this passage. Our responsibility then would be to determine whether Congress had prescribed the statute's temporal reach by using the normal means of statutory construction: canons, legislative history, inference. But Justice Stevens inserted the words "express" and "expressly" in the Landgraf opinion and they must be given some meaning. In our dictionary, the adjective "express" means "clearly indicated; explicit"--which in turn precludes the type of inferential analysis the majority engages in at length. Since the statute contains no express--i.e., no explicit--temporal command, we must proceed to determine whether the statute has a retroactive effect.[3]

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[3] The majority believes Landgraf can't have meant what it says because this would impose a big burden on courts: Anytime Congress doesn't explicitly provide a temporal provision, courts would have to inquire whether the statute has a retroactive effect. See maj. op. at 25-26. We fail to see how the "retroactive effect" inquiry is any more burdensome than trying to figure out congressional intent in the absence of an explicit statutory command.

The majority also objects that courts will have to engage in a provision by-provision "retroactive effect" analysis. Maj. op. at 25. This may be undesirable, but it's precisely what Landgraf calls for. See 511 U.S. at 280 ("[T]here is no special reason to think that all the diverse provisions of the Act must be treated uniformly . . . [so] courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct."). In fact, the very next case after Landgraf in the United States Reports concerns whether a different provision of the same law at issue in Landgraf is retroactive. See Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

Assuming, however, that something short of an explicit statutory command will suffice to signal congressional intent regarding retroactivity, the evidence of congressional intent the majority cites is very thin. The majority rightly points out that Chapter 153's statutory companion--Chapter 154, which creates special "opt-in" capital habeas procedures--was made immediately applicable to pending cases by an express statutory command. Pub. L. No. 104-132, § 107(c), 1996 U.S.C.C.A.N. (110 Stat.) 1226. According to the majority, by explicitly making Chapter 154 retroactive but saying nothing about Chapter 153, Congress must have intended Chapter 153 to apply prospectively. Were we writing on a clean slate, this might be a pretty good argument. But Landgraf specifically rejected this sort of negative inference; in fact, our court made a very similar argument which the Court rejected. See Estate of Reynolds v. Martin, 985 F.2d 470, 474 (9th Cir. 1993). We have little doubt it will do so again.[4]

The majority makes much of the legislative history,

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[4] Actually, it is a bit odd that Congress inserted a temporal provision into Chapter 154, but didn't do the same in Chapter 153, but it's not so odd that we are left with the inescapable conclusion that Congress meant to attach any significance to the difference. Congress may have focused on Chapter 154's temporal scope but overlooked Chapter 153's because of a significant difference between the two chapters: Chapter 153 merely amends existing procedures while Chapter 154 creates a brand new habeas track. Congress may have assumed that the amendments to existing procedures would go into effect immediately, but wasn't so sure about the brand new procedures, especially since these new procedures were contingent on another event occurring in the future--a state qualifying as an "opt-in." See 28 U.S.C. § 2261 ("opt-in" state must provide competent post-conviction counsel to defendants); Leavitt v. Arave, 927 F. Supp. 394, 398 (D. Idaho 1996) (Chapter 154 needed an effective date provision to prevent the inference from the opt-in requirements that it only applied to future cases).

which it claims supports its negative inference. But there's nothing in the legislative record on the question of Chapter 153's temporal scope. In comparison, Landgraf decided that the 1991 Civil Rights Act's legislative history, which was full of many conflicting opinions about whether the Act was intended to apply to pending cases, lacked a crucial ingredient to make the negative inference persuasive: any evidence that "an agreement had been tacitly struck." 511 U.S. at 262-63. We're at a loss to figure out how a completely barren record can reveal that "an agreement had been tacitly struck " as to Chapter 153's temporal scope.

The majority briefly cites the selective incorporation of 28 U.S.C. §§ 2254(a),(d) & (e) of Chapter 153 into Chapter 154 as evidence that Congress intended Chapter 153 to be prospective. See maj. op. at 21; 28 U.S.C. § 2264(b).[5] The majority, however, never bothers to respond to Judge Easterbrook's well-reasoned explanation of this selective incorporation: that it was designed to specify "not 'when,' but 'which' "provisions of section 2254 would apply to opt-in cases. See Lindh, 96 F.3d at 862; see also Hunter, 101 F.3d at 1570 n.3. Petitioner attempts to counter Judge Easterbrook's argument by pointing out that it would mean the exhaustion rules in opt-in cases would be different from those in traditional habeas proceedings: sections 2254(b) & (c) (the traditional exhaustion rules) weren't among those provisions incorporated into Chapter 154. The answer, it seems to

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[5] The argument seems to be that this incorporation would have been superfluous--another section of Chapter 154 already declares that section 2254 will apply to opt-in cases--unless it was intended to make the retroactivity provision in Chapter 154 apply to sub-sections 2254(a),(d) and (e) when used in opt-in cases. This would only be necessary if section 2254 wasn't retroactive already, which could only be true if Chapter 153 weren't retroactive.

me, is that Congress made a deliberate choice to create new and different exhaustion rules for opt-in cases, see 28 U.S.C. § 2264(a), and we must respect that decision. That may put states at a disadvantage in some cases, see id. § 2264(a)(3), but that may be a price Congress intended states to pay in return for an expedited process.

B

Applying section 2254(d) to Jeffries's case, it's clear we cannot second guess the Washington Supreme Court's adjudication of the juror misconduct claim. That court resolved the claim on the merits, applied the correct law and reasonably applied the law to the facts before it. See 28 U.S.C. § 2254(d). The majority asserts the authority to disregard the Washington Supreme Court's opinion because that court allegedly applied the wrong harmless error standard and relied on an erroneous fact. According to the majority, these mistakes strip the opinion of the protection granted by section 2254(d)'s deferential standard of review. Ironically, this holding is itself based on serious factual and legal errors.

The factual error: The majority chastises the Washington Supreme Court for failing to apply the Chapman v. California, 386 U.S. 18 (1967), harmless error standard on collateral review. See maj. op. at 35-36. Citing Rose v. Clark, 478 U.S. 570 (1986), the majority claims that Chapman was the clearly established collateral review standard as announced by the United States Supreme Court in 1986, the time of the Washington Supreme Court's decision. Although Rose was a habeas case, and the opinion does refer to the Chapman standard, id. at 576, the Court in Rose did not establish the correct harmless error standard for collateral review. How do we know? The Supreme Court told us so in Brecht v. Abrahamson, 507 U.S. 619 (1993): "Although we have

applied the Chapman standard in a handful of federal habeas cases, see, e.g., . . . Rose v. Clark, 478 U.S. 570 (1986) . . ., we have yet squarely to address its applicability on collateral review." Id. at 630 (citations omitted). Although ahead of its time, the Washington Supreme Court actually applied the correct harmless error standard. Compare Brecht, 507 U.S. at 637 (habeas petitioner must show "substantial and injurious effect," i.e., "actual prejudice") with Jeffries, 722 P.2d at 100 ("petitioner must show 'actual and substantial prejudice'").

The legal error: Section 2254(d)(2) provides that federal courts need give no deference to a state court adjudication "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2) (emphasis added). Significantly, section 2254(d)(2) doesn't require that the state court discover the ultimate truth; rather it requires the state court to do its best given the information in the record before it.

Here, the Washington Supreme Court's observation that "[o]ver two and a half years passed between the trial and the time the alleged misconduct was discovered" reflected the evidence presented in Jeffries's collateral proceeding. See Jeffries, 722 P.2d at 100. In fact, it appears to be based on Jeffries's own assertion:

> Mr. Tyszko came forward later after being troubled by his conscience. Until he did these issues were hidden from everybody.

Reply Brief to Personal Restraint Petition, Washington v. Jeffries, No. 52323-1, at 7 n.1 (Wash. Mar. 3, 1986). Earlier in the same brief, Jeffries states that Tyszko "came forward almost two years later and told defense counsel

what happened." Id. at 4.[6] It's therefore not surprising that the Washington Supreme Court based its ruling on the assumption that over two years passed before "the alleged misconduct was discovered." Even the dissenting justices had the same understanding of the facts. See Jeffries, 722 P.2d at 101 (Utter, J., dissenting) ("Two years [after Jeffries's trial], two jurors . . . filed affidavits . . . .").

Of course, we know now that this statement was incorrect, but the evidence to the contrary wasn't presented to the Washington Supreme Court when it was adjudicating the claim of juror misconduct. Kathleen Sims's November 16, 1983, affidavit wasn't part of the record in the collateral proceedings. As the majority notes, it was buried in the substantial record on direct appeal, where Jeffries hadn't raised the juror misconduct claim. See maj. op. at 35 n.20. This evidence therefore cannot be considered for purposes of section 2254(d)(2), which limits federal courts to evaluating a state court's factual determinations "in light of the evidence presented in the State court proceeding" in which "the claim" at issue was adjudicated. 28 U.S.C. § 2254(d)(2).[7]

The majority ignores this important limitation and, in so doing, threatens to render all of section 2254(d) a

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[6] In fact, Jeffries attempted to raise this issue again in two subsequent personal restraint petitions, and his briefs filed in those cases also contain the same factual misstatement. See Personal Restraint Petition Reply Br., In re Patrick James Jeffries, No. 53397-1, at 7 (Apr. 30, 1987); Brief of Petitioner, Personal Restraint Petition, In re Patrick James Jeffries, No. 56153-2, at 23 (June 15, 1989). In both cases, the Washington Supreme Court refused to reconsider its earlier ruling.

[7] We're confused by the majority's argument that use of the plural "proceedings" in the preamble to section 2254(d) makes some difference, especially since the applicable subsection clearly uses the singular. Compare maj. op. at 35 n.19 with 28 U.S.C. § 2254(d)(2).

nullity.[8] Recall that section 2254(d)(2) creates an exception to the rule of deference established by section 2254(d). If the exception weren't narrowly limited, petitioners could easily circumvent section 2254(d) by planting factual errors in state court dispositions. This case is a perfect blueprint of how to do it. Not only was the Sims affidavit included in the record for a different proceeding than the one at issue here, but it was never mentioned in any of Jeffries's briefs before the Washington Supreme Court, in neither the direct nor collateral proceedings. See maj. op. at 35 n.20. And, as noted above, Jeffries himself planted the factual mistake in the minds of the Washington Supreme Court Justices. See p.12 supra. Moreover, once the Washington Supreme Court issued its opinion rejecting his personal restraint petition, Jeffries didn't move for rehearing in an attempt to alert the court to the mistake. If the Washington Supreme Court's treatment of this issue in light of petitioner's presentation is unreasonable, Congress surely wasted its time in passing section 2254(d)(2).[9]

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[8] The majority seems to think we would require petitioners to file voluminous trial court records in every state appellate proceeding. See maj. op. 35 n.19. Not at all. It's not where the evidence is located that matters; Jeffries could have incorporated the Sims affidavit by reference. What matters is that he never brought the evidence to the court's attention; he never mentioned the Sims affidavit in any of his state appeals and misled the court by making contrary representations. Under such circumstances, a state court cannot then be said to have made an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2) (emphasis added).

[9] The majority also claims that new section 2254(d) doesn't apply to Jeffries because the writ was granted before April 24, 1996. See maj. op. at 36 n.21. The majority seems to believe that new section 2254(d)'s standard of review applies only at the moment when the initial decision to issue the writ is made. The majority therefore argues that, "[b]ecause we are not considering whether to order the

* * *

While the application of the 1996 Act ends this case for us, we go on to address the majority's arguments on the merits because they amount to a serious misapplication of various important jurisprudential doctrines.

II

If the vague comments referring to Jeffries's prior conviction made in the juryroom were harmful in this case, there is no case where such an error could be harmless. The majority thus has created what in practice is a per se rule of reversal for cases where information adverse to the defendant is uttered by or to one of the jurors outside the courtroom. In doing so, the majority gives birth to a mutant breed of trial errors that are "inherently prejudicial" and thus indistinguishable from structural errors. This end-run around Brecht v. Abrahamson was attempted once before in Thompson v. Borg, 74 F.3d 1571, 1577 (9th Cir.) (Reinhardt, J., dissenting), cert. denied, 117 S. Ct. 227 (1996), but was rebuffed. See Thompson, 74 F.3d at 1575 n.1 (the dissent's reasoning is "contrary to the

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district court to issue a writ, but are merely affirming the prior issuance of the writ . . ., the Act does not preclude relief." Id. This argument proves too much: If it were true, courts of appeals would never be bound by section 2254(d) in reviewing a district court's decision to grant the writ. Moreover, this argument ignores the traditional rule that a "complaint ha[s] no vested right in the decree of the District Court while it [is] subject to review." American Foundries v. Tri-City Council, 257 U.S. 184, 201 (1921). Moreover, the majority's claim that it's merely affirming the district court's grant of the writ is belied by the opinion's mandate, which reverses the grant of the writ as to the underlying first-degree murder conviction but orders its issuance as to the aggravated murder conviction and resentencing. See maj. op. at 37.

particularized case-by-case analysis of prejudice required by Brecht"). We should do the same here. Our failure to faithfully apply the Brecht standard will likely force the Supreme Court to send us another wake-up call. Cf. California v. Roy, 117 S. Ct. 337, 339 (1996) (9th Circuit applied the wrong harmless error standard by modifying Brecht), rev'g Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc).

Of course, the majority can't announce its new creation out loud because a per se rule of reversal for non-structural errors would squarely contradict Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991), which holds that only structural errors merit automatic reversal on collateral review; any other error must be "quantitatively assessed in the context of other evidence presented in order to determine whether [it] was harmless . . . ." Id. at 308. Instead, the majority reaches its goal through the back door by purporting to conduct a harmless error analysis. Sure, the majority enumerates a number of factors that could mitigate the harmful effect of the juror misconduct, but there's no evidence the majority actually considers them. All that seems to matter is that the information was "intrinsically prejudicial." See maj. op. at 11.

A genuine harmless error analysis would lead the majority to the inescapable conclusion that the extrinsic evidence here didn't have a substantial injurious impact on the verdict. See Brecht, 507 U.S. at 623. First, there was "overwhelming evidence" of Jeffries's guilt. Jeffries, 722 P.2d at 101; see Hughes v. Borg, 898 F.2d 695, 700 (9th Cir. 1990). The jury deliberations were lightning quick: Guilt phase deliberations took no more than ten hours;[10]

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[10] The record reflects that the jury began deliberating at 3:00 p.m. on November 4, 1983, adjourned for the night at 9:35 p.m., was ordered to return at 9:00 a.m. the next morning, and reached a verdict by 12:31 p.m. that afternoon.

penalty phase deliberations took five hours. Moreover, the extrinsic evidence was irrelevant as to one theory of aggravation. Recall that to convict Jeffries of aggravated murder, the jury had to find that he killed in order to conceal another crime. Wash. Rev. Code § 10.95.020(7) (1983). Evidence of Jeffries's prior robbery conviction might arguably have affected a finding that he murdered the Skiffs to conceal his robbery, but it couldn't possibly have affected the State's other theory, that Jeffries's killed Mrs. Skiff to prevent her from exposing Jeffries's earlier murder of her husband. See State v. Jeffries, 717 P.2d 722, 741 (Wash. 1986); R.T. at 3503, 3514.

Second, the substance of the information communicated wasn't nearly as damaging as the majority claims. The district judge merely found that a juror stated something "to the effect that Jeffries either had a record or had been convicted of robbery." Order on Remand, Jeffries v. Wood, No. C90-925D, at 1-2 (Feb. 17, 1995).[11] This information was extremely vague, see Thompson, 74 F.3d at 1576, and related to a prior conviction of a very different sort than that charged--it's not very likely that jurors would conclude that, because a defendant had committed a robbery, he would be predisposed to commit murder, see United States v. Field,

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[11] The district court made two sets of factual findings. After the evidentiary hearing in 1991, the court determined the circumstances surrounding the making of the alleged "remark"--i.e., when, where and how it was made--but did not actually determine the substance of the remark. See Jeffries v. Blodgett, 771 F. Supp. 1520, 1539 (W.D. Wash. 1991). Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) ("Jeffries III"), cert. denied, 510 U.S. 1191 (1994), remanded the case so the district court could determine the substance of the remark; the entirety of the district court's finding on remand is quoted in the text above. These findings will only be second-guessed if clearly erroneous. See Bonin v. Calderon, 59 F.3d 815, 823 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996).

625 F.2d 862, 872 (9th Cir. 1980) ("[T]he conviction was not for a crime sufficiently similar to [the charged crime] to raise the spectre of 'he did it before, he could do it again.'").

In fact, Jeffries's own actions belie the assertion that information regarding his criminal record was "intrinsically prejudicial." Although Jeffries tried to keep this information from the jury, he allowed one juror--the same juror who made the first misconduct allegations--to take a seat in the jury box even though she knew about his record. See Voir Dire of Kathleen Sims, Oct. 13, 1983, at 36-38. We must infer that Jeffries himself didn't think the information about his prior record was so "intrinsically prejudicial" that any exposure to it would automatically taint a juror's judgment.[12]

Third, the context in which the remark was made couldn't have been less damaging. We know this in part because no one is quite sure when and what was said: Seven of the ten jurors who gave statements couldn't remember any comment about Jeffries's record, one thought he had a recollection but suspected it might be imaginary, and the two that actually recall a comment gave vague and somewhat contradictory accounts. See Jeffries, 771 F. Supp. at 1538. Whatever was said apparently wasn't very memorable. At most, the district court found the remark made during the guilt phase was "made only in passing and was not repeated," "was neither considered nor dwelled upon by the jury," and was not

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[12] By comparison, if Jeffries had confessed, but the confession had been suppressed--or if he had pleaded guilty, but withdrawn the plea--and a prospective juror said he knew about it, there's no doubt that Jeffries would have challenged the juror. The same would be true if Jeffries's prior conviction had been for an inflammatory crime, like child molestation. Instead, here Jeffries was willing to rely on Sims's promise not to consider the information; a promise all the jurors made.

made during the deliberations--the most critical time. Id. at 1539. There are even fewer details about the comment allegedly made during the penalty phase. See id. at 1538.

Fourth, it's hard to imagine more effective curative steps than were taken here. Not only did the trial judge instruct jurors "to disregard any evidence which . . . was not admitted," but it also appears the jurors themselves took steps to cure the error by immediately informing whoever made the comment about Jeffries's prior record that it wasn't supposed to be considered. See Jeffries, 771 F. Supp. at 1538.[13]

It's therefore understandable that the district judge, who held an evidentiary hearing and heard the jurors testify in person, twice concluded the error here was harmless. In 1991, the district judge concluded that "there is no reasonable possibility that the introduction of extrinsic evidence affected the jury verdict . . . ." Id. at 1539 (emphasis added). And upon remand from Jeffries III, the district judge in apparent exasperation declared:

> This Court remains convinced that there was no prejudicial error from statements by a juror as to Jeffries' past record or past conviction for armed robbery. However, this Court's review is tightly circumscribed by the Court of Appeals.

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[13] For example, one juror gave the following account of the incident in the jury room:

> [One] of the jurors asked, "Didn't Jeffries have a record?" I remember saying, "I think so, but that has no bearing on this case." There was general agreement. The discussion went no further at that time.

Affidavit of Kathleen Sims, Feb. 27, 1986, attached letter.

Order on Remand, at 2. Likewise, our colleague Judge Fernandez has insisted throughout this case's tortured history that the juror misconduct could only be described as harmful if one allows the nature of the information to "sweep[ ] away all other considerations." Jeffries III, 5 F.3d at 1198 (Fernandez, J., dissenting); see also Jeffries v. Blodgett, 988 F.2d 923, 929 (9th Cir. 1993) (Fernandez, J., dissenting from order granting rehearing).

While in many cases judges can disagree in good faith about what constitutes harmless error under Brecht, there are other cases where there's only one reasonable conclusion; this is surely such a case. The only way the majority can find this error harmful is to disregard Brecht by holding that a finding of actual prejudice isn't necessary: "[T]he communication by its nature was intrinsically prejudicial and necessarily had a substantial and injurious influence on the verdict." Maj. op. at 11 (emphasis added). This holding disregards Supreme Court caselaw.

III

We also disagree with the majority's application of the law of the case doctrine. The doctrine heretofore has been a somewhat benign discretionary rule which empowers courts to swat away unwelcome requests from disappointed litigants who pester them to reverse earlier rulings; it has never before been thought to prevent a court from reconsidering its own earlier ruling in a pending case when it decides it made a mistake.

Law of the case is a prudential doctrine; it's a courteous and efficient way for a court to say "enough's enough" when litigants seek reconsideration of prior interlocutory decisions. See, e.g., Remington v. Central Pacific R.R. Co., 198 U.S. 95, 100 (1905) ("However stringent may be the practice in refusing to reconsider what

has been done, it still is but practice, not want of jurisdiction, that makes the rule."); Arizona v. California, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); Messenger v. Anderson, 225 U.S. 436, 444 (1912) ("[L]aw of the case . . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."); Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982) (the law of the case is "a voluntary limitation"). Some such doctrine is necessary to help the court bring the case to a close where a party insists on coming up with new arguments. The law of the case doctrine thus enables the court to treat its own interlocutory rulings as final and go on with the business of deciding the rest of the case. See Lockert v. United States Dept. of Labor, 867 F.2d 513, 518 (9th Cir. 1989) ("Law of the case doctrine is purely judge-made . . . to help manage efficiently their own affairs."). This serves the interests of finality, efficiency and sound judicial administration. See, e.g., United States Office of Personnel Management v. FLRA, 905 F.2d 430, 434 (D.C. Cir. 1990); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662 (5th Cir. 1974). These are very important interests, of course, but they can never stand in the way of a court's first duty--to decide the case right. Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983) ("The law of the case doctrine is not . . . a barrier to correction of judicial error."). If, for whatever reason, a court develops doubts about one of its own interlocutory rulings, it need not weigh any factors or consider any countervailing considerations before it may reconsider its own questionable ruling. See 18 Charles Alan Wright et al., Federal Practice and Procedure, § 4478, at 789 (1981) ("Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if

they wish.").[14] The court may--nay it must--go ahead and correct its own error, for no judicial sin is worse than issuing a judgment the judge knows to be wrong on the facts or law.

So what then of all those factors courts must consider in applying the law of the case doctrine--e.g., whether there is intervening authority, whether the prior decision was clearly erroneous or would cause a manifest injustice, or whether substantially new evidence was revealed in the interim? See, e.g., Leslie Salt Co. v. United States, 55 F.3d 1388, 1393 (9th Cir.), cert. denied, 116 S. Ct. 407 (1995); Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.), cert. denied, 116 S. Ct. 675 (1995); Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991); United States v. Houser, 804 F.2d 565, 568 (9th Cir. 1986). Those factors matter only where the court would otherwise choose not to reconsider its own earlier ruling in reliance on the law of the case doctrine. If, for example, a litigant who lost a summary judgment motion comes up with an intervening Supreme Court or circuit opinion that goes the other way, a district judge would not have the unfettered discretion to not reconsider its erroneous ruling.[15]

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[14] See, e.g., Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991) ("[T]he law of the case is an equitable doctrine that should not be applied if it would be unfair."); United States v. Miller, 822 F.2d 828, 832 (9th Cir. 1987) ("Law of the case should not be applied woodenly in a way inconsistent with substantial justice.").

[15] We realize that there are opinions that characterize the law of the case doctrine somewhat differently. But the language they use doesn't appear to be particularly well-thought out. See Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 613 (1987) ("The Supreme Court has not considered the intricacies of law of the case doctrine at length or in decisions having broad precedential

The action of the panel in Jeffries v. Wood, 75 F.3d 491 (9th Cir. 1996) ("Jeffries IV"), in reconsidering the Jeffries III harmless error ruling falls squarely within that prong of the law of the case doctrine which gives the court the authority to reconsider its own prior rulings. Insofar as the law of the case is concerned, then, Jeffries IV was wholly free to reconsider what it had said earlier. This does not mean, of course, that Jeffries IV was free to rewrite Jeffries III, which was a published opinion and therefore had become the law of the circuit. As the law of

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value."); Miller, 822 F.2d at 832 ("[T]he law of the case has been described by the Supreme Court as 'an amorphous concept.'" (quoting Arizona v. California, 460 U.S. at 618)).

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988), appears to be the one exception. After the Federal Circuit found that it lacked jurisdiction over a case and transferred it to the Seventh Circuit, the Seventh Circuit reconsidered the jurisdictional issue, held that the Federal Circuit was "clearly wrong" and retransferred the case. The Supreme Court reversed the Seventh Circuit for failing to abide by the law of the case, suggesting that the law of the case should be strictly adhered to. See id. at 819.

But Christianson doesn't announce a general rule. Its seemingly strict version of the law of the case was motivated by unique policy considerations: The Court wanted to prevent jurisdictional ping-pong—i.e., to prevent cases from being perpetually bounced back and forth between courts that disagreed over jurisdictional questions, which the Court considered inherently subject to disagreement. See id. at 818-19. Thus, the Court carved out a special rule. In defining the law of the case as applied generally, the Court used terms consistent with our view:

> "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . . ."

Id. at 817 (emphasis added).

the circuit operates in our court, no three-judge panel may reconsider a rule of law embodied in a prior published opinion; that can only be done by the court sitting en banc. See United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992) ("[O]ne three-judge panel of this court cannot reconsider or overrule the decision of a prior panel."); see also Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1479 (9th Cir. 1987) ("A panel faced with [a conflict between precedent] must call for en banc review . . . ."). The fact that it happens to be the same panel in the same case doesn't make a difference. Having issued a published opinion which became final--which other panels of this court and other courts of this circuit justifiably relied on--the Jeffries panel could no longer simply reverse its earlier ruling. It was bound just like every other panel--not because its earlier ruling was the law of the case but because it was the law of the circuit.[16]

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[16] To ensure that this mistake doesn't recur, we would hold that, whenever law of the case and law of the circuit problems arise in the same case, the law of the circuit principle supplants any law of the case considerations. See United States v. 162.20 Acres of Land, 733 F.2d 377, 379 (5th Cir. 1984) ("In this circuit, however, the law-of-the-case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent."); see also LaShawn A. v. Barry, 69 F.3d 556, 571 (D.C. Cir. 1995) (Randolph, J., dissenting) ("[I]n circuits such as ours, where both doctrines are at work, the more exacting law-of-the-circuit doctrine supplants the law-of-the-case doctrine when panels hear multiple appeals from a single case."), vacated by 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc), petition for cert. filed, 65 U.S.L.W. 3632 (Mar. 11, 1997) (No. 96-1433). Supplanting the law of the case with the law of the circuit not only eliminates the confusion engendered by this case, but also assures that the law of the circuit will remain an absolute rule. Once a panel publishes a disposition, it loses the power to reconsider the issue on a subsequent appeal; instead, it can only correct a mistake by calling sua sponte for en banc. Fortunately, such clear mistakes occur infrequently enough that our en banc resources

should not be overly burdened. See 1B Moore's Federal Practice ¶ 0.404[4.-5], at II-25 n.11 (1996).

Many circuits have confronted the issue but decided not to resolve it. See, e.g., LaShawn A., 87 F.3d at 1395 ("Because the law-of-the-case doctrine alone precluded [reconsideration], we need not delve deeply into the interplay between the law-of-the-case and the law-of-the-circuit doctrines."); Liberty Mut. Ins. v. Elgin Warehouse & Equip., 4 F.3d 567, 571 n.7 (8th Cir. 1993) ("Arguably the en banc rule is incompatible with a subsequent panel deviating from the law of the case established by a prior panel decision . . . . However, . . . we need not consider this issue . . . ."); cf. Lacy v. Gardino, 791 F.2d 980, 985 (1st Cir. 1986) ("We need not decide, however, whether the two habeas petitions are the same or different cases requiring the application of either the law of the case doctrine or stare decisis."). But the Fifth Circuit is a notable exception: It supplants the law of the case with law of the circuit, although there are some anomalous decisions. Compare Missouri Pac. R.R. v. Railroad Comm'n, 948 F.2d 179, 186 (5th Cir. 1991) ("We see no reason to reconsider our earlier decision. . . . [I]t is a 'well-known and longstanding rule of decision in this circuit that one panel cannot overrule another.'") with Blair v. Sealift, Inc., 91 F.3d 755, 761 n.26 (5th Cir. 1996) (noting the "wrinkle" that prior decisions "could either be considered the law of the case or the application of a 'prior' panel decision, i.e., the binding precedent of this circuit" (emphasis in original)). The Third Circuit has similarly expressed some doubt whether a panel may depart from the law of the case even when a prior opinion was clearly erroneous, which is akin to enforcing the law of the circuit principle. See Todd & Co. v. SEC, 637 F.2d 154, 157 & n.4 (3d Cir. 1980).

Commentators are divided on how to resolve this issue. Although noting that the relationship between the law of the case and the law of the circuit "is not altogether clear," Professor Moore appears to endorse supplanting the law of the case with the law of the circuit. See 1B Moore's Federal Practice ¶ 0.404[4.-5], at II-25 & n. 11. Professor Wright, however, appears to disagree: "Whatever may be said of the need to bind all succeeding panels to the stare decisis effect of a circuit decision in separate litigation, [the law of the circuit] rule should not be followed on successive appeals in the same case." See 18 Wright, Federal Practice and Procedure § 4478, at 692 n.25 (Supp.

The majority conflates the two concepts, to the detriment of both. On the one hand, it applies law of the case to prevent a court from correcting its own erroneous ruling and, as we explain below, with disastrous consequences for petitioner. On the other hand, the majority weakens the law of the circuit doctrine by holding that a panel does, in fact, have discretion to overrule its own published opinions, so long as the law of the case balancing is satisfied. See maj. op. at 15 ("When [subsequent panels rely on the initial decision], a panel must be exceedingly careful in altering the law of its earlier [published] opinion."). This is a power we have never before granted to a single panel of the court and it's a troubling weakening of the rule that only an en banc court may overrule published circuit precedent.

But it is the other aspect of the majority's holding that is the most troublesome--the rule that a court is bound by its own erroneous interlocutory ruling, even when it comes to the realization that it has made a big mistake. Is this just window dressing--a lot of fancy language that we can expect will be applied sensibly in the future? Not at all. The majority's application of this doctrine in our case is nothing short of procrustean.

The majority, it will be remembered, has concluded that the jury deliberations were impermissibly tainted because some of the jurors were aware of Jeffries's prior robbery conviction. On this basis it reverses petitioner's death sentence. But precisely the same analysis applies to Jeffries's murder conviction--only more so. While the jury might well have given Jeffries the death penalty even if it did not believe he had participated in the robbery,[17]

1996) (discussing Missouri Pac. R.R., 948 F.2d at 186).

[17] The prosecution, it will be recalled, had two theories on which it sought the aggravated murder conviction: that Jeffries killed both

commission of the robbery was at the heart of the prosecution's murder case.[18] It would seem to follow, therefore, that if the aggravated murder conviction was tainted, so was the underlying first-degree murder conviction.

The majority seems to concede as much but nonetheless leaves the murder conviction intact--and defendant subject to a sentence of life imprisonment. See Wash. Rev. Code § 9A.32.040. Why? Strange as it may seem, because this is "true to our law of the case holding." Maj. op. at 17. If the law of the case doctrine precludes reconsideration of a first degree murder conviction we now know is tainted, we can't imagine the case where a panel is ever justified in defying the law of the case doctrine by reconsidering an earlier ruling.

Of course, we do not agree that either the sentence or the conviction was tainted, so we are not troubled about the substantive outcome of this part of the majority's

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victims to conceal the robbery and that he killed Mrs. Skiff to conceal his earlier killing of Mr. Skiff. See Jeffries, 717 P.2d at 741; R.T. at 3503, 3514.

[18] The state introduced the robbery evidence to show Jeffries's motive and to tie him to the murders. The state introduced evidence that $30,000 in Canadian money was missing from the Skiffs' residence, that Jeffries was seen flashing large amounts of Canadian cash shortly after the murders, and that Jeffries sold or attempted to sell items stolen from the Skiffs shortly after the murders. See Jeffries v. Blodgett, 974 F.2d 1179, 1185 (9th Cir. 1992). And, here's how the state explained Jeffries's motive: "[W]hy [did defendant murder the Skiffs]? Two reasons, one for greed and the other for cover-up. The defendant wanted some property and he had to kill . . . to get away with it." R.T. at 3503. Finally, the state argued that the murderer and robber were the same person: "I don't know what precipitated the killing, but [whoever did it] was greedy and [Jeffries's] Counsel admitted it. Whoever killed him, and I submit it was Jeffries, is greedy." R.T. at 3532.

ruling. But the majority's willingness to let stand a conviction that, by its own analysis, was unconstitutionally obtained--and let petitioner rot in prison for the rest of his life--just points out how powerful a doctrine law of the case is in the majority's mind. This lesson will not be lost on future panels, and on other courts in this circuit, when they consider going back to correct their own errors. The result will be a fair number of more erroneous rulings and useless appeals to correct mistakes that could have been taken care of by the court that made the error in the first place.[19]

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[19] We mention only in passing another curious aspect of the majority's holding. At one point, the majority concedes that the law of the case doctrine does not apply to an en banc court. See maj. op. at 14. And, of course, it does not--any more than our errors are binding on the Supreme Court. See Christianson, 486 U.S. at 817. Yet the majority then goes on and applies law of the case anyway. Very strange indeed.

[FILED]
[January 24, 1996]

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-99003
D.C. No. CV-90-00925-CRD

OPINION

PATRICK JAMES JEFFRIES,

Petitioner-Appellee,

v.

TANA WOOD, Superintendent,

Respondent-Appellant,

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted November 28, 1995
Pasadena, California

Filed January 24, 1996

Before: GOODWIN, FARRIS and FERNANDEZ, Circuit Judges.

Opinion by Judge Goodwin

GOODWIN, Circuit Judge:

The State of Washington, in the name of its chief prison official, appeals the judgment which, after a remand from this court, granted Patrick James Jeffries' petition for a writ of habeas corpus. In 1983, Jeffries was convicted in Clallam County Superior Court and sentenced to death on two counts of aggravated first-degree murder.

The Washington Supreme Court affirmed Jeffries' conviction and sentence on direct appeal. State v. Jeffries, 105 Wash.2d 398, 717 P.2d 722), cert. denied, 479 U.S. 922 (1986). Jeffries filed three personal restraint petitions in state court, all of which the Washington Supreme Court denied. In re Jeffries, 722 P.2d 99 (1986); In re Jeffries, 110 Wash.2d 326, 752 P.2d 1338, cert. denied, 488 U.S. 948 (1988); In re Jeffries, 114 Wash.2d 485, 789 P.2d 731 (1990).

Two years after Jeffries was sentenced, two jurors filed affidavits, describing a juror's misconduct. (A juror, during a recess while the trial was in progress, had, indeed, told one or more fellow jurors that Jeffries was an ex-convict, on parole, for a prior robbery, at the time he was accused of robbing and murdering the victims).

The federal habeas corpus proceedings began in 1990, alleging, inter alia, the juror misconduct. See Jeffries v. Blodgett, 771 F. Supp. 1520 (W.D. Wash. 1991). In assessing whether the alleged juror misconduct deprived Jeffries of a fair trial, the district court conscientiously followed the teaching of Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986). The district court concluded that even if the alleged juror misconduct

had occurred, it did not affect the verdict. Jeffries, 771 F. Supp. at 1538-39.

We affirmed the district court's resolution of all of the issues on the first appeal to this court, including the juror misconduct question. See Jeffries v. Blodgett, 974 F.2d 1179 (9th Cir. 1992). However, on Jeffries' petition for rehearing, we withdrew the opinion reported at 974 F.2d 1179, vacated the judgment which had denied the writ, and remanded for a decision on the question of fact whether juror misconduct as discussed in the opinion had actually occurred. See order and opinion in Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993), and Dissent by Judge Fernandez, id. at 941. That opinion was then amended by Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), Judge Fernandez concurring and dissenting, Id. at 1198, after denial of a petition for rehearing and rejection of rehearing en banc.

During our consideration of the petition for rehearing, we became aware of a possible conflict between our September 9, 1992, opinion and Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988), which did not appear to have been briefed or argued in this case before the district court. Nor was Dickson mentioned in our first opinion affirming the denial of the writ. However, Dickson came to dominate our consideration of the Jeffries petition for rehearing, and later, of the state's petition for rehearing.

Dickson is, obviously, an important case on jury verdicts tainted by improper communications with a jury by officers of the court. Dickson, coincidentally, is a direct descendant of Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed.2d 420, (1966), which reversed the Oregon Supreme Court (opinion reported at 245 Or. 426, 407 P.2d 246 (1965)), which had treated the statements of a garrulous bailiff to one or more jurors as harmless error. Dickson, having originated in Oregon and sharing some facts with Parker v. Gladden, supra, with reference to jury

contamination by officers of the court (deputy sheriffs) communicating with jurors, was taken very seriously by the panel considering Jeffries' petition for rehearing. The author of this opinion had participated in the state court decision in Parker v. Gladden, and was once again being taken to task for treating as harmless error jury contamination by information external to the testimonial record.

For whatever reason, intensive advocacy, judicial speed reading, or an older appellate judge reacting to scholarly criticism long after the Parker reversal when he was younger, or all of the above, the author of our opinion affirming the denial of the writ proceeded to argue to his colleagues that perhaps we had been wrong, and that we should grant Jeffries' petition for rehearing. See Jeffries, 5 F.3d at 1190, 1191, obscuring the difference between the Dickson contamination by officers of the court, and internal contamination within the jury itself by the misconduct of a juror.

On remand, the district court, in a carefully considered review of the record and juror affidavits, restated its earlier finding that the juror misconduct had been harmless on the whole record of the case. The juror's breach of the general instruction to consider only the evidence presented in the trial did not announce any information that had not been common knowledge in the venue. All the jurors had promised to put out of their minds any information they had learned from the news media or from friends and neighbors, and to decide the case only on the evidence. One juror broke the rule. The district court treated this inherent weakness in the jury system as harmless in this case, but held, however, under the compulsion of our dictum in the opinion remanding the

case[1], that the writ was to be granted.

The state, as noted, now has appealed, asserting that our remand decision was based upon an incorrect application of the law, and to the extent it compelled the district court to grant the writ, it was wrong. The appeal urges this court now to correct its error, and to vacate the judgment granting the writ. Jeffries argues that we were right when we granted his petition for rehearing and remanded the case, and that the doctrine of the law of the case precludes reexamination of the juror misconduct issue on the state's appeal from the district court's granting of the writ under compulsion of our opinion in Jeffries v. Blodgett, 5 F.3d 1180, supra.

The Law of the Case

When a court changes its mind during trial, appeal, or consideration of a petition for rehearing, the more common proceedings in which a court may change the course of the litigation, the question of "law of the case" immediately comes to mind. This salutary doctrine guides, but does not necessarily handcuff, judicial discretion. As Justice Holmes noted in Messinger v. Anderson, 225 U.S. 436, 444 (1912), "[I]n the absence of statute the phrase, 'law of the case', as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

"Thus the court may reconsider previously decided questions in cases in which there has been a intervening change of controlling authority, new evidence has surfaced,

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[1] See Jeffries, 5 F.3d at 1191 (suggesting, in its direction to the district court on remand, that it the alleged misconduct did occur the petition must be granted).

or the previous disposition was clearly erroneous and would work a manifest injustice." Leslie Salt Co. v. United States, 55 F.3d 1388, 1393 (9th Cir.), cert.denied, ___ U.S. ___, 116 S. Ct. 407, 133 L. Ed. 2d 325 (1995); see also Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.), cert. denied, ___ S. Ct. ___, 64 U.S.L.W. 3412, 16 (U.S. Dec. 11, 1995); Herrington v. County of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993); Thomas v.Bible, 983 F.2d 152, 155 (9th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 2443, 124 L. Ed. 2d 661 (1993); Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991); Adamian v. Lombardi, 608 F.2d 1224, 1228 (9th Cir. 1979), cert. denied, 446 U.S. 938, 100 S. Ct. 2158, 64 L. Ed. 2d 791 (1980).

We agree with the state's appeal, and that Judge Fernandez was right in his dissent. See, Jeffries v. Blodgett, 988 F.2d supra at 941 (Fernandez, J. dissenting). The doctrine of the law of the case does not relieve us of the duty to correct our own manifest error in telling the district court that Dickson v. Sullivan required "the same result" in this case. Our prior decision was "clearly erroneous and would work a manifest injustice." Leslie Salt, 55 F.3d at 1393.

Dickson v. Sullivan Distinguished

In our application of Dickson v.Sullivan to the petition for rehearing, we read that case too broadly. We failed to discern the significant difference between external contamination of a jury by officers of the court (Dickson) and internal misconduct by a fellow juror, who remembered from the past facts that had not been part of the evidence, and mentioned them to the other jurors. That was our mistake, and we admit it. Now, with that unflattering display of our prior handling of this unhappy case, we must decide the state's appeal. The case has again been briefed and argued. We have again gone over

the pertinent parts of the record. As Baron Bramwell put it some years ago: "The matter does not appear to me now as it appears to have appeared to me then." Andrews v. Styrap, 26 L.T.R. (N.S.) 704, 706 (Ex. 1872).

We are satisfied that a principled ground exists for distinguishing the Parker v. Gladden-Dickson v. Sullivan line of cases, where habeas relief was granted because of a presumption of prejudice caused by officers of the court communicating their views to jurors, from irregular jury conduct cases, such as United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770 (1993).

In Olano, the government appealed a reversal by this court in a federal case dealing with alternate jurors being present during deliberation, a situation in which prejudice is not presumed, but must be established. Similarly, affidavits revealing the prohibited conversations of jurors among themselves during a trial do not create a presumption of prejudice. In such cases, the inquiry should be whether the juror misconduct had a "substantial and injurious effect or influence in determining the jury's verdict." See, e.g., O'Neal v. McAninch, ___ U.S. ___, 115 S.Ct. 992 (1995); Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 1718 (1993).

In the case at bar, the district judge had no doubt at all, much less a "grave doubt" that the misconduct of the juror was harmless when measured by the Brecht v. Abrahamson standard.

With delayed but sincere apology to the district judge for whom we have not made work on this case easy, we respectfully vacate the judgment appealed from by the state and remand to the district court for the entry of judgment denying the petition.

REVERSED and **REMANDED.**

[FILED]
[February 17, 1995]

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C90-925D

ORDER ON REMAND

PATRICK JAMES JEFFRIES,

Petitioner,

v.

TANA WOOD, Superintendent of
the Washington State Penitentiary,

Respondent.

Petitioner Patrick James Jeffries was convicted on two counts of murder and sentenced to death by a Washington court in November of 1983. His petition for habeas corpus was denied by this Court in September of 1991. Jeffries v. Blodgett, 771 F. Supp. 1520 (W.D. Wash. 1991). On appeal, the Ninth Circuit Court of Appeals affirmed this Court on all issues, but one -- juror misconduct. Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993).

The Court thus has before it, on remand, a single issue: Whether the two affidavits submitted by jurors Thomas Tyszko and Kathleen Sims are true. This Court finds that statements were made in the presence of the jury

to the effect that Jeffries either had a record or had been convicted of robbery.

The Court has reviewed all past testimony -- both live testimony and deposition testimony. Mr. Tyszko and Ms. Sims were credible witnesses whose accounts remained consistent and were not contradictory.[1] Moreover, the statements that they heard were, in fact, true. The Court can ascertain no motive for either of these witnesses to fabricate. In fact, pressure from the community and their own sense that the guilty verdict was justified, if anything, would have encouraged them to remain silent.

In reaching this conclusion, it is not necessary to find that the eight jurors who testified as to not hearing or not recollecting that they heard any comment about Jeffries' prior record or Jeffries' conviction for armed robbery, were incorrect. Rather, they may well not have heard or understandably may not recollect events of some years before. Additionally, two jurors did not testify.

This Court remains convinced that there was no prejudicial error from statements by a juror as to Jeffries' past record or past conviction for armed robbery. However, this Court's review is tightly circumscribed by the Court of Appeals. This Court thus finds that the two jurors were telling the truth.

THEREFORE, pursuant to the Court of Appeals' reasoning, a writ of habeas corpus should issue.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 17th day of February, 1995.

/s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
Chief Judge

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[1]Ms. Sims' first affidavit was signed on November 16, 1983; Mr. Tyszko's first affidavit was signed on December 10, 1985.

Supreme Court, U.S.
FILED
OCT 14 1997
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No. 97-289

In the Supreme Court of the United States

OCTOBER TERM, 1996

TANA WOOD,

Petitioner,

vs.

PATRICK JAMES JEFFRIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED (RESTATED):

Did the court below err in following the previously established law in this case, which this Court declined to review?

TABLE OF CONTENTS

Page No.:

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

A. The Decision below Merely Followed the Previously Established Law of the Case, Which this Court Previously Declined to Review. 8

B. At Least since *Brecht*, No Circuit Court Has Presumed Prejudice When Reviewing Claims of Juror Misconduct Raised by State Prisoners in Federal Habeas Corpus Proceedings. 12

C. The Application of *Brecht v. Abrahamson* to the Jury Misconduct in this Case No More Warrants this Court's Review Now than it Did in 1994. 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Arizona v. Fulminante, 499 U.S. 279, 306-10 (1991) 13

Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986) 20

Bibbins v. Dalsheim, 21 F.3d 13 (2d Cir.),
cert. denied, 513 U.S. 901 (1994) 12-13

Blodgett v. Jeffries, 510 U.S. 1191 (1994) 6, 11

Bonner v. Holt, 26 F.3d 1081 (11th Cir. 1994),
cert. denied, 514 U.S. 1010 (1995) 13

Borja v. Prunty, 866 F. Supp. 451 (S.D. Cal. 1994) 9

Brecht v. Abrahamson, 507 U.S. 619 (1993) ..... *passim*

Burgett v. Texas, 389 U.S. 109 (1967) 24

1 *Burr's Trial* 416 (1807) 24

Chapman v. California, 386 U.S. 18 (1967) 13

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 8, 10

Custis v. United States, 511 U.S. 485 (1994) 24

Dyer v. Calderon, 1997 WL 559868 (9th Cir. Aug. 19, 1997)
(*to be reported at* 122 F.3d 720) 14

Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981) .. 21

Irvin v. Dowd, 366 U.S. 717 (1961) 24

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) 6, 18, 20

Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (*en banc*) ..... *passim*

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Lawson v. Borg, 60 F.3d 608 (9th Cir. 1995) 9, 14

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir.),
cert. denied, 116 S. Ct. 407 (1995) 10

Little Earth of the United Tribes, Inc., v. United States Dep't of Housing & Urban Dev., 807 F.2d 1433 (8th Cir. 1986) 9

Mattox v. United States, 146 U.S. 140 (1892) 18

Old Chief v. United States, 117 S.Ct. 644 (1997) 18

O'Neal v. McAninch, 513 U.S. 432 (1995) 16

Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1997), *petition for cert. filed,*
66 U.S.L.W. 3086 (U.S. July 3, 1997) (No. 97-58) 9

Reeves v. AcroMed Corp., 103 F.3d 442 (5th Cir. 1997) 9

Rodriguez v. Marshall, No. 96-16268, 1997 WL 556068 (9th Cir. Sept. 9, 1997) 14

Roy v. Gomez, 81 F.3d 863 (9th Cir.) (*en banc*),
vacated and remanded, California v. Roy, 117 S.Ct. 337 (1996),
on remand, 108 F.3d 242 (9th Cir. 1997)(*en banc*),
cert. denied, 1997 WL 438240 (U.S. Oct. 6, 1997) 15

Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66 (4th Cir. 1988) 9

Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 765 (1997) ... 13

Starr v. Lockhart, 23 F.3d 1280 (8th Cir.),
cert. denied, 513 U.S. 995 (1994) 13

State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722,
cert. denied, 479 U.S. 922 (1986) 1, 3, 22

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Thompson v. Borg, 74 F.3d 1571 (9th Cir.), *cert. denied*, 117 S.Ct. 227 (1996) 9, 19

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997), *cert. granted*, 1997 WL 434000 (U.S. Aug. 4, 1997), *as amended*, 1997 WL 524896 (U.S. Aug. 26, 1997) 11

Turner v. Louisiana, 379 U.S. 466 (1965) 24

United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) 15

United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990). 20

United States v. Johnston, 268 U.S. 220 (1925) 7

United States v. Moored, 38 F.3d 1419 (6th Cir. 1994) 9

Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058 (11th Cir. 1996) 9

Statutes and Rules Cited:

Supreme Court Rule 10 ..... 6, 7

Washington Revised Code § 10.95.020 (1983) 2

United States Constitution:

Amendment VI 1

Amendment VIII 1

Amendment XIV 1

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part as follows:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to [trial] by an impartial jury of the district wherein the crime shall have been committed; [to] be confronted with the witnesses against him; [and] to have the assistance of counsel for his defense.

Amendment VIII

> [C]ruel and unusual punishments [shall not be] inflicted.

Amendment XIV

> No State [shall] deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE[1]

For two months in early 1983, Patrick Jeffries lived with Phillip and Inez Skiff in rural Clallam County, Washington. He had befriended the couple, who admired his wood sculptures, while serving a prison term in Canada; he went to their home upon his release. The Skiffs provided Mr. Jeffries food and shelter, and gave him tools and materials for wood-carving. The relationship between Mr. Jeffries and the Skiffs was amicable; for example, they allowed him to house-sit alone during their extended absence in February, when they traveled to California.

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[1] Where not otherwise specified, this statement of facts is drawn from *State v. Jeffries*, 105 Wash. 2d 398, 717 P.2d 722, 726-28, *cert. denied*, 479 U.S. 922 (1986).

There were no eyewitnesses to the deaths of the Skiffs, and no murder weapon was ever found. Mr. and Ms. Skiff were last seen alive on March 19, around noon and 1:30 p.m., respectively. Late in the afternoon of the same day, Mr. Jeffries tried to sell a television set belonging to the Skiffs to some neighbors. That evening, he was seen at a bar with a large amount of cash, spending freely. Four days later, Mr. Jeffries left the area in the Skiffs' truck, with some of their property, including a chain saw, a television, food, and blankets. He was arrested a few days later in Wenatchee, Washington.

The prosecution charged Mr. Jeffries with 2 counts of aggravated first-degree murder, alleging two aggravating circumstances: that he murdered the Skiffs (1) "to conceal the commission of a crime or the identity of a person committing a crime"; and (2) "as part of a common scheme or plan."[2] At several points before and during trial, the prosecution sought leave to admit evidence of Mr. Jeffries' prior felony convictions from Canada, including a conviction for armed robbery. *See, e.g.*, 7 REC 2110-13; 10 REC 3326-33; 11 REC 3563-68. Despite having repeated opportunities to do so, however, the prosecution could not show that Mr. Jeffries had been represented by counsel in those cases. 10 REC 3327 (trial court's statement that "the evidence . . . does not show that the Defendant was represented by Counsel [in the cases that led to his Canadian convictions]"); 11 REC 3568

[2] In order to convict a defendant of aggravated first-degree murder under Washington law, the jury must find the defendant guilty of premeditated murder and find one of several defined aggravating circumstances to exist beyond a reasonable doubt. *See* Wash. Rev. Code §10.95.020 (1983). The jury must make this finding with respect to the existence of aggravating circumstances at the "guilt phase" of trial.

(trial court's statement that "counseled convictions . . . have not been proven [and so this evidence] will not be admitted"). Accordingly, the trial judge excluded this evidence.

At trial, the prosecution pursued a single factual theme in presenting and arguing its entirely circumstantial case: that Mr. Jeffries murdered the Skiffs to rob them of their property. For example, the prosecutor hammered home this theory in closing argument at the guilt phase of trial: "The defendant wanted some property and he had to kill for it and he had to kill both of them in order to get away with it." 11 REC 3503; *see also* 11 REC 3502, 3530, 3532. On direct review, the Washington Supreme Court acknowledged that "the jury's findings and verdict [were] that defendant killed the victims in order to steal their property and to prevent his identification as their killer." *State v. Jeffries*, 105 Wash. 2d 398, 717 P.2d 722, 728, *cert. denied*, 479 U.S. 922 (1986). However, the weight of the evidence supporting the aggravating factors was slight; it barely survived, by a five to four vote, the "substantial evidence" test on direct appeal. *State v. Jeffries*, 717 P.2d at 749 (Pearson, J., dissenting) (since the evidence showed that Mr. Jeffries had had multiple prior opportunities to steal the Skiffs' property without having to kill them to do so, "[a] fair evaluation of the evidence merely shows that Jeffries murdered the Skiffs and *subsequently* stole some of their property"; because the evidence did not show conclusively that "the *purpose* of the killing" was to facilitate the theft, the aggravating factors could not be sustained) (both emphases in original).

Eight days after the jury returned its sentencing verdict against Mr. Jeffries, and two days before he was formally condemned to die by the trial court, juror Kathleen Sims signed

a sworn affidavit stating that, during trial, one of the jurors had made a statement to the rest of the jury about Mr. Jeffries' "past record."[3] 15 REC 4912. Juror Sims' affidavit was filed with Mr. Jeffries' motion for new trial, which the trial court denied without considering Ms. Sims' affidavit. 11 REC 3639-40; 15 REC 4918; 16 REC 4988.

About two years later, juror Thomas Tyszko, who had never had contact with Ms. Sims after the end of trial, approached one of Mr. Jeffries' trial attorneys in a local tavern and shared a more detailed, and troubling, version of the same events. According to juror Tyszko, sometime shortly after the State began to present its circumstantial case against Mr. Jeffries, another juror "stated to the entire jury in the jury room" that Mr. Jeffries was "a convicted armed robber." 19 REC 5804, 5855-56. The juror added, "'Oh, we're not supposed to know that, are we?'" 19 REC 5855. A "dead silence" followed the juror's remarks. *Id.* His comment about Mr. Jeffries' prior record, accompanied by "a smirk," left juror Tyszko "with [the] clear implication that he considered the trial a waste of time." *Id.*

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[3] Petitioner misleads the Court in reciting the procedural history of Mr. Jeffries' case. Petitioner states that "approximately two years after his trial," Mr. Jeffries filed a state post-conviction proceeding to raise his claim of juror misconduct. Petition for Writ of Certiorari at 5. Petitioner further states that Mr. Jeffries filed affidavits from jurors Sims and Tyszko at that time, in support of his claim. *Id.* Then, Petitioner recites the Washington Supreme Court's holding that "Over two and a half years passed between the trial and the time the alleged misconduct was discovered, indicating that the jurors involved did not believe [it] significant." *Id.* at 5-6.

Petitioner nowhere acknowledges that Ms. Sims first brought the jury misconduct to the trial court's attention only *days*, not years, after Mr. Jeffries' trial. *See* Respondent-Appellant's Excerpt of Record in *Jeffries v. Wood*, No. 95-99003, U.S. Ct. App. 9th Cir., at Tab 27, p. 2 n.1 (opinion of the district court, noting that "Ms. Sims' first affidavit was signed on November 16, 1983"). Given that this fact was a subject of focused attention in the *en banc* court below, *see Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997) (acknowledging that "neither party disputes that the Washington Supreme Court factually erred on this pivotal point"), Petitioner's misleading description of the facts in this Court is difficult to excuse as accidental.

Juror Tyszko informed counsel that he had been "deeply troubled" by these comments for a long time after trial, which finally led him to come forward. *Id.*

During the course of post-conviction proceedings in state and federal court, jurors Tyszko and Sims testified both live and by affidavit,[4] providing additional detail concerning the juror's comments about Mr. Jeffries' prior conviction during trial. For example, juror Sims recalled that the juror who mentioned Mr. Jeffries' prior record did so in "a rather disgruntled tone of voice," confirming juror Tyszko's clear recollection that the juror had communicated his attitude that the whole trial was "a waste of time." Respondent-appellant's Excerpt of Record in *Jeffries v. Wood*, No. 95-99003, U.S. Ct. App. 9th Cir. (hereinafter ER), at Tab 18, p. 8. Juror Tyszko further described the juror's tone as "mocking"; and confirmed that "the whole jury" must have heard the remark. ER at Tab 21, pp. 92, 97. At one juncture juror Sims stated that "[d]uring the deliberation regarding his sentence, there was some discussion of Mr. Jeffries character in the light of his possible record." 19 REC 5854.

The federal district court, after reviewing "all past testimony," ultimately found that jurors Tyszko and Sims were "credible witnesses whose accounts remained consistent and were not contradictory," and concluded without qualification that they "were telling the truth." ER at Tab 27, p. 2.

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[4] Prior to her live testimony in federal district court, juror Sims had submitted four affidavits (the first of which was submitted eight days after trial) and one letter concerning the juror's remark. Juror Tyszko submitted three separate affidavits in addition to testifying under oath and withstanding cross-examination.

REASONS FOR DENYING THE WRIT

No compelling reason exists for this Court to review the judgment of the *en banc* Court of Appeals, which rests on the "law of the case" doctrine and neither creates nor reflects any conflict of interpretation among the lower courts.[5] *See* Sup. Ct. R. 10 ("certiorari will be granted only for compelling reasons"). Given the facts described above, the four-year-old panel decision adhered to as the law of the case[6] was an unremarkable application of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). That conclusion is consistent with this Court's refusal to hear Petitioner's challenge to the prior ruling itself, *see Blodgett v. Jeffries*, 510 U.S. 1191 (1994), and nothing in the opinion of the *en banc* Court of Appeals altered the earlier panel's analysis. Petitioner asserts, mistakenly, that the *en banc* panel relied on a "presumption of prejudice" to resolve Mr. Jeffries' juror misconduct claim. *See, e.g.*, Petition for Writ of Certiorari (hereafter Pet.) at 15. Claiming to have identified a division of authority about whether such a presumption exists, Petitioner urges the Court to grant certiorari and clarify any uncertainty in the law.

The problem with this reasoning is that a fair reading of the opinions below (as opposed to the brief and misleading quotations surgically extracted by Petitioner), demonstrates that the Court of Appeals invoked no such presumption in Mr. Jeffries' case, but instead faithfully applied the *Brecht* standard. This fact is fatal to both Petitioner's asserted reasons for granting the writ. First, to the extent that any "split" of authority exists

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[5] The opinion of the *en banc* Court of Appeals in Mr. Jeffries' case has been reported as *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (*en banc*).

[6] *See Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993).

among the Circuits, it concerns examination of juror misconduct claims on direct review of federal criminal convictions, not on federal habeas corpus review of convictions obtained in state court. Not only did the *en banc* Ninth Circuit in *Jeffries* eschew any presumption of prejudice, but subsequent Ninth Circuit jury misconduct cases demonstrate that no panel of that court understands *Jeffries* to have announced a "presumption of prejudice" for considering such claims. Moreover, this view is consistent with that of every court of appeals to consider the question since *Brecht*.

Petitioner's second Question Presented reveals that the issue Petitioner really wants this Court to consider is not whether *Brecht* applies to juror misconduct claims, but whether the original panel decision, adhered to by the *en banc* panel as the law of the case, correctly applied *Brecht* to the facts of Mr. Jeffries' case. *See, e.g.*, Pet. at 15 (arguing that the *en banc* panel "mishandled" *Brecht*, not that it applied some other standard). It is axiomatic that this Court does not sit to review such fact-intensive questions. *United States v. Johnston*, 268 U.S. 220 (1925) (Supreme Court does not grant certiorari to review evidence and discuss specific facts); Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of [the] misapplication of a properly stated rule of law") . Petitioner and the dissent below attempt to convert this case-specific inquiry, which would make no new law, into a legal dispute about the meaning of *Brecht*. Even a cursory examination of the relevant opinions, however, demonstrates that both the original panel and its *en banc* successor correctly applied *Brecht*. The judgment reached by the original panel, and subsequently ratified by the *en banc* panel as governed by the law of the case, is unworthy of certiorari review.

A. The Decision below Merely Followed the Previously Established Law of the Case, Which this Court Previously Declined to Review.

Petitioner conspicuously avoids discussing at any length the actual basis for the *en banc* panel's judgment; namely, that the original three-judge panel's decision applying *Brecht* to the facts of Mr. Jeffries' case established the law of the case, which was entitled to be followed thereafter. *See Jeffries*, 114 F.3d at 1488-93 (discussing the law of the case doctrine); *see also id.* at 1509-12 (Kozinski, J., dissenting) (disagreeing with majority's treatment of the doctrine). The *en banc* panel, in the "merits" portion of its opinion, viewed the merits of Mr. Jeffries' juror misconduct claim through the lens of the law of the case doctrine, rather than engaging in *de novo* examination of the claim. The distinction is important at this juncture. First, absent some question of overriding national importance, this Court as a prudential matter ought not grant review of a judgment reached in reliance on the law of the case doctrine unless the lower court's application of that rule is in conflict with the other federal courts of appeal. While the law of the case doctrine is not a limit on judicial power, it nevertheless describes a principle from which courts should not deviate "in the absence of extraordinary circumstances," because the doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-17 (1988) (citations omitted). It is apparent that Petitioner can identify no flaw in the Ninth Circuit's application of the law of the case doctrine, because Petitioner has not sought review on that ground.[7]

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[7] The *en banc* panel's invocation of the law of the case doctrine does not "insulate [the underlying] issue from this Court's review," *Christianson*, 486 U.S. at 817. However, the same institutional considerations that generally support adherence to the law of the case (finality and efficiency)

There is nothing novel about the *en banc* panel's application of the law of the case doctrine to the circumstances presented here. The law of the case doctrine holds generally that the decision of an appellate court on a particular issue must be followed in all subsequent proceedings in the same case, absent certain specified exceptions. The federal courts of appeal, following this Court, have uniformly described those exceptions as permitting reconsideration of a prior decision when (1) the prior decision was "clearly erroneous and would work a manifest injustice;" (2) intervening controlling legal authority has undermined the legal basis for the prior decision; or (3) substantially different evidence was adduced at the intervening trial.[8]

In refusing to follow its own prior decision applying *Brecht* to the facts of Mr. Jeffries' case, the three-judge panel had invoked the first exception, asserting that its prior decision (which this Court had declined to review, and which other panels of the Ninth Circuit had followed without criticism or question[9]) had been "clearly erroneous and would work a manifest injustice." *Jeffries*, 114 F.3d at 1489 (quoting *Jeffries v. Wood*, 75 F.3d 491, 494 (9th Cir. 1996)). The *en banc* panel traced the extensive support for the reasoning

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deserve attention in determining whether the Court should grant certiorari; in the present case, the *en banc* panel's reliance on the law of the case counsels the Court to deny review.

[8] *See, e.g., Reeves v. AcroMed Corp.*, 103 F.3d 442, 448 (5th Cir. 1997); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1063 (11th Cir. 1996); *Pennington v. Doherty*, 110 F.3d 502, 505-06 & n.5 (7th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3086 (U.S. July 3, 1997) (No. 97-58); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994); *Little Earth of the United Tribes, Inc., v. United States Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1440 (8th Cir. 1986); *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 68 (4th Cir. 1988); *see also Jeffries*, 114 F.3d at 1489 (citing additional authority).

[9] *See, e.g., Thompson v. Borg*, 74 F.3d 1571, 1575 n.1 (9th Cir.), *cert. denied*, 117 S.Ct. 227 (1996); *Lawson v. Borg*, 60 F.3d 608, 612-13 (9th Cir. 1995). District courts within the Ninth Circuit likewise invoked the original panel's analysis without criticism; *see Borja v. Prunty*, 866 F. Supp. 451, 455 (S.D. Cal. 1994).

of each part of the earlier panel opinion, and concluded that no part of that decision could be characterized as "clearly erroneous." *Id.* at 1490-92. The standard for "clear error" in the law of the case context is demanding; to prevail, a party "must show not only that the [earlier holding] was wrong, but that it was clearly wrong." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir.), *cert. denied,* 116 S. Ct. 407 (1995); *see also Christianson*, 486 U.S. at 819 (because law of the case should be "a heavy deterrent to vacillation on arguable issues," it entitles "plausible" decisions to deference) (citation omitted). Given this exacting legal standard, it is perhaps no surprise that Petitioner does not challenge the *en banc* panel's discussion or application of the law of the case doctrine. The fact that the decision below rests on the law of the case, and that Petitioner has asserted no conflict of interpretation among the lower courts concerning that doctrine, supports denial of the writ.

In addition, as the *en banc* panel pointed out, even a showing of "clear error" in the earlier panel opinion would not have entitled Petitioner to a different result after remand unless Petitioner could also demonstrate that a "manifest injustice" would result from adhering to the earlier ruling. *Jeffries*, 114 F.3d at 1492. Neither in its briefing nor at oral argument in the court below could Petitioner make any factual showing of manifest injustice. *Id.* As with the *en banc* panel's treatment of the issue of "clear error" in the earlier panel decision, Petitioner has not challenged the conclusion below that her failure to demonstrate "manifest injustice" would preclude deviation from the law of the case in this matter even if the earlier panel had erred in its disposition.

In sum, the fact that the *en banc* panel rested its judgment on the law of the case doctrine, and in doing so applied those principles consistent with the views of this Court and other Circuits, makes this case singularly unsuitable for plenary review on certiorari.[10]

Finally, as noted, Petitioner's assertions that the Ninth Circuit has failed faithfully to apply *Brecht* in this case should sound familiar, because Petitioner raised near-identical complaints when it sought review of the original panel decision in 1993. *See* Petition for Writ of Certiorari in *Blodgett v. Jeffries*, No. 93-971 (O.T. 1993). That Petition characterized the Ninth Circuit as having held that juror exposure to Mr. Jeffries' prior conviction for armed robbery "presumptively prejudice[d]" him. *Id.* at 13. Petitioner conceded that the three-judge panel had acknowledged "the new standard for harmless error in *Brecht*," *id.* at 10, but insisted that it had adopted a "per se" rule, instead of conducting a case-specific inquiry. *Id.* at 11; *see also id.* at 16 (contending that the panel, although "purport[ing] to invoke the *Brecht v. Abrahamson* harmless error standard," "clearly felt itself bound by" pre-*Brecht* case law); *id.* at 18 (panel's standard of review "is incompatible with *Brecht*"). This Court declined to review the original panel decision. *Blodgett v. Jeffries*, 510 U.S. 1191

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[10] Judge Kozinski's dissent on the law of the case issue is curiously inconsistent with the strong views he has elsewhere expressed about upholding the finality and stability of prior decisions when they are subsequently called into question. *See Jeffries*, 114 F.3d at 1510 (Kozinski, J., dissenting) (arguing that a court "need not weigh any factors or consider any countervailing considerations" before jettisoning a prior ruling, and that the "law of the case" exceptions should only guide courts in deciding when *not* to exercise this unlimited discretion to reconsider prior rulings). In *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *cert. granted*, 1997 WL 434000 (U.S. Aug. 4, 1997), *as amended*, 1997 WL 524896 (U.S. Aug. 26, 1997), Judge Kozinski declared that upsetting an otherwise final judgment, even to correct an acknowledged error in a prior opinion, was unwise because "there are few petitioners who can't make out a colorable claim" of similar circumstances. *Id.* at 1070 (Kozinski, J., dissenting). If this Court's grant of review in *Thompson* reflects a sense that extraordinary steps (*e.g.*, recalling the mandate, or deviating from the law of the case) should be supported by uniquely compelling circumstances, those considerations would counsel against granting certiorari here.

(1994) (denying certiorari). The reasoning of that four-year-old panel decision is no more worthy of plenary review today simply because it has recently been followed by the *en banc* Ninth Circuit as the law of the case.

B. At Least since *Brecht*, No Circuit Court Has Presumed Prejudice When Reviewing Claims of Juror Misconduct Raised by State Prisoners in Federal Habeas Corpus Proceedings.

Petitioner asserts broadly that "[t]he circuit courts are not uniform in their handling of jury misconduct claims involving extrinsic information." Pet. at 12. A string of citations follows. *Id.* However, what Petitioner fails to point out is that any "dispute" among the circuit courts over whether to presume prejudice in reviewing claims of juror misconduct exists only with respect to the direct review of federal criminal convictions -- not habeas corpus review of state convictions, as in Mr. Jeffries' case. All the cases Petitioner cites, save one, fall into the former category. As demonstrated below, there is no such "dispute" in the federal habeas corpus context. Three Circuits take precisely the same position as the *en banc* Ninth Circuit below; more important for present purposes, no decision of any Circuit is to the contrary.

This conclusion -- that since *Brecht*, the circuit courts to address the question have unanimously rejected the application of a "presumption of prejudice" in reviewing juror misconduct claims on habeas corpus review of state convictions -- is illustrated by the sole habeas corpus case Petitioner cites.[11] In *Bibbins v. Dalsheim*, 21 F.3d 13 (2d Cir.), *cert.*

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[11] The only Circuit which might not concur that *Brecht* is the correct standard would impose a less stringent burden than the standard under which Mr. Jeffries prevailed in the court below. The Eighth Circuit has held that where the state court failed to review a habeas petitioner's claim under the harmless

denied, 513 U.S. 901 (1994), the Second Circuit cited the "limited" nature of its "review of the effect of constitutional errors on a state court conviction" in concluding that no "presumption of prejudice" applies in such cases. *Id.* at 16 (requiring petitioner to show "actual prejudice" from the claimed misconduct, citing *Brecht*).

But *Bibbins* does not stand alone; other cases readily demonstrate that the courts of appeal understand that, after *Brecht*, they may not presume prejudice from juror misconduct on habeas corpus review. In *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 765 (1997), for example, the *en banc* Fourth Circuit strongly rejected the notion that juror misconduct claims were not subject to harmless error review under *Brecht*. *Id.* at 1137-41 (summing up the court's position by declaring that "[w]e shall adhere consistently to the *Brecht* standard in collateral proceedings"). Nor does the Eleventh Circuit rely on any "presumption of prejudice" when reviewing jury misconduct claims by state prisoners seeking federal habeas relief. *See, e.g., Bonner v. Holt*, 26 F.3d 1081, 1082-84 (11th Cir. 1994), *cert. denied,* 514 U.S. 1010 (1995) (applying *Brecht* in granting relief on claim that jurors were exposed to extrinsic information about defendant's prior criminal record).

If Petitioner's claim that *Jeffries* announced a "presumption of prejudice" for reviewing jury misconduct claims were true, one would expect to find subsequent Ninth Circuit panels employing, or at least acknowledging, such a presumption. But no Ninth

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error standard of *Chapman v. California*, 386 U.S. 18 (1967), the federal habeas court should use *Chapman*, rather than *Brecht*, in conducting its review. *See, e.g., Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994). It is also conceivable, although no Circuit has so held, that juror misconduct of the sort at issue here should not be considered "trial-type" error under *Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991), because its effect cannot be "quantitatively assessed." In any event, as noted in the text, *supra,* because the Circuits to face the question have unanimously agreed that *Brecht* is the appropriate standard in cases such as Mr. Jeffries', the Court need not review this issue.

Circuit panel has done so. In *Rodriguez v. Marshall*, No. 96-16268, 1997 WL 556068 (9th Cir. Sept. 9, 1997), for example, the panel asserted that "[o]n habeas review, Rodriguez bears the burden of establishing that [the jury's exposure to extrinsic information] had a 'substantial and injurious effect or influence in determining the jury's verdict,'" citing *Brecht*. *Id.* at *3; *see also id.* at *5 (same). In a flat rejection of the position Petitioner claims is now the law in the Ninth Circuit, the *Rodriguez* court emphasized that "there is no authority for the proposition that prejudice is presumed from the mere existence of juror misconduct." *Id.* at *6. One observation in particular refutes Petitioner's characterization of the holding of the *en banc* court in *Jeffries*: replying to "Rodriguez's contention that *Jeffries* establishes a rule that any and all incidents of internal juror misconduct create a strong presumption of prejudice," the court responded that the *en banc* panel "made clear ... that our traditional inquiry into the prejudicial effect of the extrajudicial information remains at the heart of our inquiry into whether habeas relief is warranted on the facts of a particular case." *Id.* at *11 n.4 (citing *Jeffries*, 114 F.3d at 1490-92). Other post-*Jeffries* Ninth Circuit habeas cases concerning juror misconduct likewise employ *Brecht* without reference to any presumption of prejudice. *See, e.g., Dyer v. Calderon*, 1997 WL 559868, at *20 (9th Cir. Aug. 19, 1997) (to be reported at 122 F.3d 720) (applying *Brecht* and noting that "presum[ing] prejudice" from juror misconduct on habeas review "is not the law of our circuit," citing *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

These cases expose Petitioner's alleged "conflict among the circuits" as illusory. Since *Brecht*, no Circuit has employed a presumption of prejudice in assessing harm from

a claim of juror misconduct by a state prisoner in federal habeas corpus proceedings. The *en banc* panel in *Jeffries* did not employ such a presumption, and other panels of the Ninth Circuit following *Jeffries* have expressly rejected the notion that it did. As it has done in every other federal habeas case applying *Brecht* to a claim of juror misconduct, the Court should deny certiorari.

Petitioner contends that in addition to the dispute over whether to presume prejudice from juror misconduct, there is a further conflict over whether "the source [of] extraneous information" is dispositive of the question of harm. Pet. at 13, citing *United States v. Bertoli,* 40 F.3d 1384, 1394-95 (3d Cir. 1994). *Bertoli* concerned premature deliberations by jurors rather than their exposure to information that was not properly admitted from the witness stand, and its relevance to this very different context is questionable. In any event, the existence of one easily distinguishable case does not establish an important conflict of interpretation. The overwhelming majority of courts have sensibly concluded not to focus primarily on the source of the information, but to weigh the content of the information in the context of all other relevant circumstances of the case. *Jeffries*, 114 F.3d at 1490 n.4 (collecting cases). No conflict on this issue requires this Court's intervention.[12]

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[12] We note that Petitioner repeatedly attempts to analogize the *en banc* panel's decision below to the actions of the Ninth Circuit in an earlier opinion which required correction by this Court. *See* Pet. at 11, 15, 20; *see also Roy v. Gomez*, 81 F.3d 863 (9th Cir.) (*en banc*), *vacated and remanded, California v. Roy*, 117 S.Ct. 337 (1996), *on remand*, 108 F.3d 242 (9th Cir. 1997) (*en banc*) (denying habeas relief), *cert. denied*, 1997 WL 438240 (U.S. Oct. 6, 1997). Reviewing harm from a jury-charge error on habeas corpus in *Roy*, the Ninth Circuit had "appl[ied] the analysis developed by Justice Scalia in his concurring opinion in *Carella v. California*." *Roy*, 81 F.3d at 866 (citation omitted). This Court summarily vacated the judgment of the Court of Appeals, holding that it had created a "special standard" for measuring harm which was distinct from *Brecht*. *Roy*, 117 S.Ct. at 338-39. The Court remanded for reconsideration of the issue under *Brecht*, and on remand the Ninth Circuit found the error harmless under *Brecht* and denied relief. *Roy*, 108 F.3d at 243. The most immediately apparent distinction between *Roy* and the present

C. The Application of *Brecht v. Abrahamson* to the Jury Misconduct in this Case No More Warrants this Court's Review Now than it Did in 1994.

Contrary to Petitioner's characterization of the Court of Appeals' analysis of Mr. Jeffries' juror misconduct claim, the court below did not presume prejudice in determining whether the standard of *Brecht v. Abrahamson,* 507 U.S. 619 (1993), had been met in this case. On the contrary, the Court of Appeals' majority carefully and explicitly reviewed the factors supporting its conclusion that the jurors' exposure to information about Mr. Jeffries' uncounseled prior convictions was harmful enough to require a new sentencing hearing. Indeed, the court below did not even think the question was close enough to require resort to the rule of *O'Neal v. McAninch*, 513 U.S. 432 (1995) (where federal habeas court is "in equipoise" with respect to whether a petitioner was harmed by a violation of his constitutional rights, it must grant relief). A summary examination of the Ninth Circuit's application of *Brecht* to the facts of this case demonstrates that certiorari review on this fact-specific issue is unwarranted, because both the three-judge panel and the *en banc* panel correctly applied *Brecht* in holding that Mr. Jeffries suffered substantial harm from the jury's exposure to information about his uncounseled prior robbery conviction.

The Court of Appeals began with a statement that plainly bedevils Petitioner -- that the information about Mr. Jeffries' uncounseled prior robbery conviction "by its nature was

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case is that the Ninth Circuit in *Roy* openly disavowed *Brecht* in favor of a novel harm test derived from *Carella*. This Court understandably found it necessary to provide additional guidance. In Mr. Jeffries' case, by contrast, the Ninth Circuit since *Brecht* has never suggested that *Brecht* was not the appropriate standard for conducting a harm analysis. On the contrary, both the original panel opinion and the *en banc* panel opinion endorsing the earlier analysis as the "law of the case" specifically cite and apply *Brecht*. Neither opinion purports to create any new or hybrid standard. Petitioner's strained attempt to invoke *Roy,* therefore, is unavailing.

intrinsically prejudicial." *Jeffries,* 114 F.3d at 1491; *see also id.* (the information carried "inherent prejudice"). Seizing upon this wording, Petitioner draws the sweeping conclusion that the *en banc* panel created a "presumption of prejudice" for reviewing claims of juror misconduct. A fairer reading of the passage as a whole is that otherwise inadmissible information about the defendant's prior criminal record is frequently, but not inevitably, prejudicial -- because it supports the strong common sense inference that the defendant, having committed a similar crime in the past, is probably guilty of the current charge. After all, the *en banc* panel went on to discuss the various specific factors that could lead a reviewing court to conclude that the defendant suffered no "actual and substantial" harm from the jury's exposure to such information. *See Jeffries*, 114 F.3d at 1491-92; *see also infra.* If the panel had concluded that the nature of the information about Mr. Jeffries' prior conviction for robbery foreclosed a finding of "no prejudice," it would hardly have bothered listing all the other factors supporting its ultimate conclusion. Indeed, the *en banc* Ninth Circuit concluded that Mr. Jeffries suffered prejudice with respect to the jury's findings of aggravating circumstances, but not with respect to its verdict finding him guilty of first-degree murder (warranting relief from his death sentences, but not his convictions). *Jeffries*, 114 F.3d at 1493. That outcome is impossible to reconcile with Petitioner's characterization of the panel's reasoning.

Put another way, there is nothing inconsistent with *Brecht* in saying that the essence of this particular information -- extrinsic information about Mr. Jeffries' prior uncounseled conviction -- is something that would often cause a judge to have a "grave doubt," or more,

about the fairness and reliability of the jury's findings on the aggravating circumstances. As the original panel opinion pointed out, the extrinsic information was "both directly related to a material issue in the case and highly inflammatory." *Jeffries*, 5 F.3d at 1190 (citation omitted). The panel went on to observe, correctly, that where the extrinsic information concerns a prior conviction similar to the charge at issue, there is a high risk that jurors may be "overwhelmed" by "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." *Id.* at 1191 (citation omitted). Just last Term, this Court strongly cautioned against the same tendency in an analogous context. *See Old Chief v. United States*, 117 S.Ct. 644, 652 (1997) (warning that jurors may be "lure[d] into a sequence of bad character reasoning" when they are aware of "the name or nature of the [defendant's] prior offense"; when the prior offense is "similar to other charges in [the] pending case the risk of unfair prejudice [is] especially obvious"). Thus understood, both the original panel decision and its *en banc* successor are directly in line with the innumerable cases which have long recognized that extraneous evidence of a defendant's prior criminal activity usually has a highly prejudicial effect on the jury. *See, e.g., Mattox v. United States*, 146 U.S. 140, 150 (1892). Even the *en banc* dissenters acknowledged that some types of information (such as the fact of a suppressed confession, a previously withdrawn plea of guilty, or a prior conviction for an "inflammatory crime, like child molestation") carry inherent prejudice. *See Jeffries*, 114 F.3d at 1508 n.12 (Kozinski, J., dissenting). The *en banc* majority's description of the information about Mr. Jeffries' prior

uncounseled robbery conviction as "inherently" prejudicial simply acknowledged that, in the context of this case, this was such information.

The *en banc* panel did not say that the nature of the extrinsic information alone required a finding that the violation of Mr. Jeffries' rights was both "injurious" and "substantial." It considered a number of possible factors that could support a finding of no "actual and substantial" harm, and showed why none of them applies to this case. For instance, the panel acknowledged that if the extraneous information were "otherwise admissible or merely cumulative of other evidence adduced at trial," less prejudice would probably result. *Jeffries*, 114 F.3d at 1491. That was emphatically not the case in Mr. Jeffries' trial; the prosecution was expressly forbidden from introducing evidence of his prior convictions, because there was no showing he had been represented by counsel in those cases. The panel also observed that if the prejudicial statement were "ambiguously phrased," it might have carried less weight. *Id.* & n.7 (citing, by way of contrary illustration, *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir.) (affirming finding of no prejudice in part because juror's remark about defendant's having previously withdrawn a guilty plea was "vague and awkwardly phrased"), *cert. denied*, 117 S. Ct. 227 (1996)). Here, there was no ambiguity in the declaration that Mr. Jeffries was "a convicted armed robber."

The panel further noted that the existence of "a curative instruction [or] some other step taken to ameliorate the prejudice" could support a finding of "no harm." 114 F.3d at 1491. In Mr. Jeffries' case, of course, the juror misconduct was not brought to light before the trial concluded, so no ameliorative steps could be taken to reduce the harm to Mr.

Jeffries. This factor, too, supports the *en banc* panel's conclusion that Mr. Jeffries suffered "actual and substantial" prejudice from the jury's awareness of his prior uncounseled robbery conviction.[13]

The *en banc* panel identified two other factors which deserved consideration in the *Brecht* analysis: the "trial context" and "the issues and evidence in the case." *Jeffries*, 114 F.3d at 1491-92. It described the former with reference to a prior Ninth Circuit opinion on jury misconduct, *Bayramoglu v. Estelle*, 806 F.2d 880 (9th Cir. 1986), which the original panel opinion had found instructive in applying *Brecht*. *See Jeffries*, 114 F.3d at 1491-92 n.10; *see also Jeffries,* 5 F.3d at 1190. *Bayramoglu* emphasized that a court reviewing a claim of juror exposure to extrinsic information should consider (1) whether the information was actually received; (2) the length of time the information was available to the jury; (3) the extent to which the jurors discussed and considered it; (4) whether the material was introduced before a verdict was reached; and (5) any other matters that might bear on the issue. *Bayramoglu,* 806 F.2d at 887. This approach was consistent with the way in which courts are to apply existing precedent under the *Brecht/Kotteakos* standard. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Brecht*, 507 U.S. at 641-42 (Stevens, J., concurring) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762 (1946)).

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[13] This fact distinguishes Mr. Jeffries' case from, *e.g.*, *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1580-81 (9th Cir. 1989) (finding harmless error where, *inter alia*, trial judge gave a specific curative instruction immediately upon learning that jurors had access to potentially harmful extraneous information), *cert. denied*, 497 U.S. 1003 (1990).

Each of these factors supports the original panel's finding of "actual and substantial" prejudice to Mr. Jeffries. The district judge specifically found that statements were made in the presence of the jurors regarding Mr. Jeffries' having a record or a prior conviction for armed robbery. Her findings also establish that the extrinsic information about Mr. Jeffries' prior conviction was received by the jurors very early in the trial, and thus that the jurors who heard this information had it to consider during most of the presentation of the state's case. ER at Tab 27, p. 2; 19 REC 5804, 5855-56. In that presentation, of course, the prosecution was attempting to prove by circumstantial evidence that Mr. Jeffries was motivated to kill the Skiffs by his desire to steal their property. The jurors' early receipt of the extraneous information concerning Mr. Jeffries' prior criminal record meant that they filtered virtually the state's entire circumstantial case through their understanding that Mr. Jeffries "had a record" or, worse, "an armed robbery conviction." Furthermore, the extraneous information was introduced into the jury room before a verdict was reached, and the jurors deliberated for nine and a half hours before concluding that Mr. Jeffries was guilty of aggravated murder.[14] All these factors support the original panel's finding that Mr. Jeffries suffered substantial prejudice from the jurors' exposure to information about his prior uncounseled robbery conviction.

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[14] The panel's decision was consistent with earlier Ninth Circuit authority on what inference to draw from the length of jury deliberations in a case where the jurors are later learned to have been exposed to extrinsic information. *See, e.g., Gibson v. Clanon*, 633 F.2d 851, 855 & n.8 (9th Cir. 1980) (prejudice from jury misconduct was manifest where jury deliberated for nine hours despite "strong" evidence against petitioner), *cert. denied*, 450 U.S. 1035 (1981). As noted, Mr. Jeffries' jury deliberated for nine and a half hours before reaching its verdict on the aggravating factors, on evidence that barely survived sufficiency review on direct appeal. The dissent below, which characterized those deliberations as "lightning quick," conspicuously failed to acknowledge, much less attempt to distinguish, *Gibson*. *See Jeffries*, 114 F.3d at 1508 (Kozinski, J., dissenting).

Finally, the "issues and evidence" at Mr. Jeffries' trial support the conclusion that the jurors' exposure to information about Mr. Jeffries' prior uncounseled robbery conviction was harmful. *See Jeffries*, 114 F.3d at 1490-92. As noted by the *en banc* majority below, the jury made two special findings that supported Mr. Jeffries' conviction for aggravated first-degree murder and the imposition of the death sentence. *Id.* at 1490. Those aggravating circumstances were that the murders were committed (1) to conceal the commission of a crime and (2) as part of a common scheme or plan. *Id.* at 1491. As the *en banc* majority correctly points out (and as Petitioner apparently concedes), "[t]he only crime referenced at trial was the crime known in common parlance as robbery; the only 'common scheme or plan' involved the commission of robbery." *Id.; see also id.* n.6 (citing *State v. Jeffries*, 717 P.2d at 735) ("It is clear from the record that the State's argument [at trial] was that the defendant killed the victims in order to steal their property")). As four dissenting Justices of the Washington Supreme Court pointed out on direct appeal, there was also evidence from which the jurors could reasonably have concluded that Mr. Jeffries killed the Skiffs for some unrelated reason, and then stole some of their property as an afterthought when he took flight. *Jeffries*, 717 P.2d at 749 (Pearson, J., dissenting). Such an inference, of course, would be nearly impossible to draw after being told that Mr. Jeffries was "a convicted armed robber." Under these specific circumstances, it is unremarkable that the original panel found that the jurors' exposure to information about Mr. Jeffries' prior robbery conviction caused him "actual and substantial" prejudice. It is equally unsurprising that the *en banc* court

subsequently ratified that finding as "not clearly erroneous" under the law of the case doctrine.

In sum, the jurors who convicted Mr. Jeffries of aggravated first-degree murder and sentenced him to death were exposed to unambiguous, inadmissible information of a type that was especially prejudicial because of the nature of the evidence and the issues in the case. They received this potent information early in the trial and no subsequent steps were taken to cure the error or ameliorate the resulting harm. They deliberated for nine and a half hours before determining that the two aggravating factors alleged by the prosecution were present, on evidence which barely survived a sufficiency challenge on direct review. The court below, in finding that these facts show "actual and substantial" prejudice from the jurors' exposure to information about Mr. Jeffries' prior uncounseled robbery conviction, faithfully applied the standard of *Brecht v. Abrahamson.*

CONCLUSION

The *en banc* panel, rather than creating some novel "presumption of prejudice," simply adopted the law of the case in applying the harm test of *Brecht v. Abrahamson* to the facts of Mr. Jeffries' claim of juror misconduct -- following the well-supported reasoning of a decision this Court had earlier declined to review. In applying *Brecht* to Mr. Jeffries' claim, both the original panel and its *en banc* successor decided this case in a manner squarely consistent with the views of the other federal circuit courts to face the issue since *Brecht.*

In the final analysis, the Ninth Circuit's conclusion that Mr. Jeffries is entitled to a new determination of the disputed aggravating circumstances in his case simply reflects this Court's consistent teaching since the eighteenth century. The jury trial guarantee of the Sixth Amendment requires that the jury's verdict "be based upon the evidence developed at the trial," regardless of the heinousness of the crime or the apparent guilt of the accused. 1 *Burr's Trial* 416 (1807); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). This basic principle "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. ... [i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). The jury's exposure to information about Mr. Jeffries' prior armed robbery conviction plainly abridged this right. Moreover, the trial judge had properly excluded evidence of Mr. Jeffries' prior convictions because the prosecution, despite repeated opportunities to do so, could not establish that they were counseled; this fact further demonstrates that the earlier panel decision, upheld as the law of the case, was correct. *See, e.g., Burgett v. Texas*, 389 U.S. 109, 115 (1967) (admission of prior uncounseled conviction is prejudicial even where jury explicitly instructed to disregard it); *Custis v. United States*, 511 U.S. 485, 494-97 (1994) (reaffirming *Burgett*; because *Gideon* error is a "unique constitutional defect," a judgment relying on an uncounseled conviction cannot stand regardless of the substantial competing interest in "finality of judgments").

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED this 10th day of October, 1997.

Respectfully submitted,

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ORIGINAL

NO. 97-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TANA WOOD,
Petitioner,

vs.

PATRICK JAMES JEFFRIES,
Respondent.

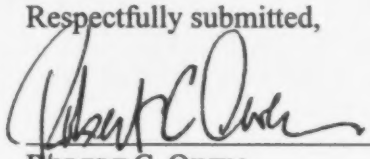
On Petition For Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that three true and correct copies of Respondent's Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari have been served upon counsel for Petitioner by placing same into the United States Mail, first-class postage prepaid, addressed to: Paul D. Weisser, Asst. Attorney General, P.O. Box 40116, Olympia, WA 98504-0116, on this date. Undersigned counsel further certifies, pursuant to Sup. Ct. R. 29, that all parties required to be served have been served.

DATED this 17th day of October, 1997

Respectfully submitted,



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FEDERAL PUBLIC DEFENDER
Western District of Washington

October 10, 1997

Office of the Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543-0001

RE: *Wood v. Jeffries*, No. 97-289

Dear Sir or Madam:

Enclosed for filing please find the original and ten copies of each of the following documents in the above-styled case:

Respondent's Motion for Leave to Proceed *In Forma Pauperis*

Brief in Opposition to Petition for Writ of Certiorari

Certificate of Service

We have enclosed one additional copy of each document to be file-stamped and returned in the enclosed self-addressed stamped envelope. Thank you very much for your kind attention to this matter.

Very truly yours,

Robert C. Owen
Counsel for Respondent
PATRICK JAMES JEFFRIES

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cc: Paul D. Weisser, Esq., Counsel for Petitioner

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